(1) Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

RAJINDER SINGH,
a.k.a. Satinger Singh

Petitioner,

vs.

HON. JOHN ASHCROFT,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Petitioner is not an "arriving alien", contrary to the ruling of the Third Circuit. Despite the admission of the factual allegations in the amended NTA by Petitioner, the facts disclose that he is deemed to have already "entered" the US, albeit illegally, and is therefore eligible for the relief of adjustment of status. INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry ... is subject to the provisions of INA § 212(a)], is the governing statute applicable to the instant case.

II. Contrary to the Third Circuit's Decision, the Immigration Court has jurisdiction to adjudicate Petitioner's application for adjustment of status, due to the fact that he is eligible under 8 C.F.R. § 245.

III. The Third Circuit should have remanded Petitioner's case to the Immigration Judge for further proceedings insofar as Petitioner's application for adjustment of status is concerned, since the Immigration Judge obviously has jurisdiction to consider Petitioner's said application.

PARTIES TO THE PROCEEDING

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II. Contrary to the Third Circuit's Decision, the Immigration Court has jurisdiction to adjudicate Petitioner's application for adjustment of status, due to the fact that he is eligible under 8 C.F.R. § 245.

III. The Third Circuit should have remanded Petitioner's case to the Immigration Judge for further proceedings insofar as Petitioner's application for adjustment of status is concerned, since the immigration court obviously has jurisdiction to consider Petitioner's said application.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit was entered on August 27, 2004, under the caption Singh v. Ashcroft, No. 04-1501 (3rd Cir. 2004)(unpublished). The judgment is attached hereto as Appendix "A". Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on December 2, 2004. The Order is attached hereto as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 27, 2004. The Third Circuit Court of Appeals had jurisdiction over this matter under INA §242(a)(b), 8 U.S.C. §1252 (a)(b), as there had been a final adjudication on the merits by the Board of Immigration Appeals on April 16, 2003. The former Immigration and Naturalization Service (INS) commenced removal proceedings on July 22, 1998, since Petitioner allegedly entered the U.S. without inspection, evidenced by the Notice to Appear, copy of which is hereto attached as Appendix "C". Subsequently, the INS amended the lodging charges, by alleging that Petitioner is an arriving alien, for allegedly procuring an immigration benefit by means of fraud or misrepresentation. Copy of the Additional Charges of Inadmissibility/Deportability is hereto attached as Appendix "D".

The Petition for Writ of Certiorari has been filed within the reglementary period prescribed by law, which is on January 13, 2004, reckoned from ninety (90) days from the date of the decision of the Third Circuit Court of Appeals on December 2, 2004, denying Petitioner's Petition for Rehearing.

STATUTORY AND REGULATORY PROVISION INVOLVED

INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry ... is subject to the provisions of INA § 212(a)].

INA § 245(i)(1)(A)(i), 8 C.F.R. § 245.1, which provides that "an alien physically present in the United States, may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence."

8 C.F.R. § 245.2(a)(1) states that, "(A)fter an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under Section 245 of the Act xx xx xx shall be made and considered only in those proceedings.

8 C.F.R. § 245.2(a)(1), which provides that, "xxx xxx xxx An adjustment application by an alien **paroled under section 212(d)(5) of the INA,** which has been denied by the

director, **may be renewed in removal proceedings** under 8 **proceedings** under 8 CFR part 240 only if: "xx xx xx. (ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application.

INA § 1.1, 8 U.S.C. 1101, which defines an "arriving alien", An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act.

REASONS FOR GRANTING THE WRIT

1. The instant appeal involves a legal issue of whether an individual whose asylum status has been revoked, has reverted to the status of "an alien who entered the US without inspection ("EWI"), since the record shows that Petitioner has effected "entry" to the US, by virtue of his previous multiple entries into the US, albeit illegally, and his grant of asylee status and advance parole. As a matter of fact, even the Immigration Judge initially concluded that Petitioner "had been admitted to the United States but was deportable for a number of reasons. However, the Immigration Judge reversed his own finding, only

INS sought to amend the original charge sheet, and because Petitioner admitted the fact that he is an "arriving alien".

2. On the other hand, the INS has not cited any provision of statute or law which declares that the revocation or termination of an individual's asylum status will automatically revert to the status of an "arriving alien". The Third Circuit also did not dwell on this particular legal issue, beyond stating that Petitioner had already conceded or admitted that he was an "arriving alien". A close scrutiny of said Third Circuit's decision will quite reveal that the Third Circuit had presumed that said Petitioner is an "arriving alien", based on his admissions of the material allegations of the amended NTA.

3. Further, this appeal involves a question of exceptional importance, *i.e.*, whether or not, despite the abrogation of the traditional distinction between exclusion and deportation hearings *per se,* and replacement of the same with removal hearings, full regard of constitutional rights should be given to someone if they are in the US even if they were not admitted. *Hoyte-Mesa v. Ashcroft*, 272 F. 3d 989 (7th Cir. 2001). Otherwise stated, whether or not the "entry doctrine fiction" should be the basis for determining when and under what circumstances persons are accorded due process in proceedings.

4. Since Petitioner's immigration status has reverted to that of an EWI, rather than an "arriving" alien, he is covered by INA § 245(i)(1)(A)(i), 8 C.F.R. § 245.1, which

provides that "an alien physically present in the United States, may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence."

5. Petitioner, therefore, is not barred from seeking the relief of adjustment of status before the Immigration Judge, even when he was subsequently placed in removal proceedings. In *"Matter of Grinberg,"* 20 I&N Dec.911 (BIA 1994), the BIA had occasion to hold, thus -

> "An immigration judge has jurisdiction to consider applications for adjustment of status under INA §245(i) filed by aliens previously ineligible under §245 (a) and §245 (c)."

6. The Third Circuit decision is conflicting with existing statute, particularly, INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry … is subject to the provisions of INA § 212(a)]. The Third Circuit should have remanded the case to the BIA to give the Agency an opportunity to address Petitioner's application for adjustment of status.

STATEMENT OF THE CASE AND FACTS

Petitioner is a native and citizen of India. He is a 45-year old Sikh male, married to a US citizen, with whom he has two (2) daughters, who were born in the U.S. Petitioner and his wife were married on August 11, 1992. Subsequently, petitioner's wife filed a Form I-130 (Petition for Alien Relative) with the former Immigration and Naturalization Service in favor of Petitioner, which was approved in April, 1998. Consequently, Petitioner filed for Adjustment of Status as spouse of a US citizen, but was denied by the Immigration Judge, allegedly due to lack of jurisdiction.

Petitioner left India because of past persecution and his fear of future persecution in the hands of the Central Reserve Police Force (CRPF). This was on account of his membership with the Sikh Student Federation (AISSF), which is a political party of Sikh youths demanding Khalistan, an independent Sikh state. Although there were different factions in the Sikh movement, his particular faction did support the Khalistan movement. Petitioner claimed that on January 13, 1992, while celebrating the Sikh religious holiday of "Lori", an inspector belonging to the CRPF hit him in the jaw when Petitioner requested him to remove his shoes before entering the "gurdwara" (Sikh temple). As a consequence, Petitioner was incarcerated for one day, and was beaten and tortured.

Petitioner came to the US on March 26, 19u)whe n he crossed from Tijuana, Mexico into San Diego, California, without being inspected by an immigration officer. He then

applied for asylum in the US on December 17, 1992, but said application was denied on September 27, 1994 on the grounds that Petitioner has not established eligibility for such relief. On September 28, 1994, an Order to Show Cause and Notice of Hearing was issued, charging Petitioner with deportability on the grounds that he entered the US illegally.

On January 8, 1996, Petitioner attempted twice to enter the US, by driving into the US from Canada. However, he was refused admission on both occasions. Copy of his Record of Deportable Alien is hereto attached as Appendix "E".

As a consequence, he was issued on the same day, an Order to Show Cause and Notice of Hearing, and charged with being a deportable alien, who entered the US without inspection.

While staying illegally in the US, petitioner re-applied for asylum on June 22, 1996, which was granted on July 30, 1996. Copy of the Notice to Grant Asylum is hereto attached as Appendix "F". Said asylum was favorably granted on the basis that Petitioner had established a well-founded fear of persecution upon return to India. Petitioner, however, allegedly at the time, did not disclose to the asylum officer that he had attempted to enter the US illegally in 1992, and that he had been previously denied asylum in September, 1994. While the asylum grant was still valid – that is, before it was revoked, Petitioner applied for a travel document (advanced parole)

and traveled to Nepal. He returned to the United States and was and was admitted on March 4, 1997.

On March 3, 1998, the INS informed Petitioner of its intent to terminate his asylum status on the grounds that it had received evidence that Petitioner had entered the US prior to March 12, 1994 and, therefore, "could not have been arrested in India on December 30, 1994 and November 18, 1995, as he had claimed in his asylum application. Petitioner did not appear for the hearing before the asylum officer, and also requested that his asylum case be withdrawn. Copies of the San Francisco Asylum Office Memorandum and Notice of Termination of Asylum Status are hereto attached as Appendixes "G" and "H", respectively.

On July 22, 1998, the INS issued a Notice to Appear (NTA), charging Petitioner with removability as an alien who had entered the US without authorization. In the course of the removal proceedings, Petitioner applied for the relief of adjustment of status based on an approved spousal petition, under 245(i) of the Immigration Nationality Act (INA). On December 2, 1998, the INS filed an amended Notice to Appear, which was denominated as "Additional Charges of Inadmissibility & Removability (Appendix "D", *supra*), dropping the original charges in the former NTA, and this time charging Petitioner as an arriving alien who, "by fraud or willfull misrepresentation of a material fact, sought to secure admission into the US.

While Petititoner admitted the allegations contained in said amended NTA, he raised the following defenses, however, to rebut said allegations, thus -

a) He is eligible to apply for adjustment of status as the beneficiary of an approved immigrant relative petition;

b) The INS admitted during the calendar hearings before the Immigration Judge that they were partly to blame for the fact that the amended charges were filed belatedly (NT, p.14, Line 23);

c) He was neither informed of the amended charges after they were lodged by the INS. As a matter of fact, he came to know of said amended charges only during the scheduled individual hearing, and was not even given the opportunity to rebut the same, since he believed he was going to be heard on the adjustment of status application;

d) The Immigration Judge should not have deemed Petitioner an arriving alien, since the Petitioner entered the US as a parolee on March 4, 1997. Contrary to the original NTA, Petitioner possessed valid parole documents which were given to him by the INS.

On March 6, 2000, after hearing the testimony and reviewing the evidence submitted, the Immigration Judge sitting at Philadelphia, Pennsylvania rendered the following questioned Decision, an excerpt of which reads thus –

> "The matter has been set down for a number of calendars because the Court was informed that the respondent was married to a lawful permanent resident and that she had petitioned for naturalization and that that naturalization was

forthcoming and she had also petitioned a Form I-130, alien relative petition for the respondent and that it had been approved as of May the 5th, 1999. The matter has been continued until today, March the 6th, the year 2000, and on this date, the respondent, through counsel, pleaded to the charging document at Exhibit 2, the Form I-261, and admitted the factual allegations and conceded the charge of removability. *The Court must find, as there has been a discussion on the record here, that the Court has no jurisdiction over an adjustment application which is pending and also that the respondent, as an arriving alien, is not eligible for voluntary departure*. He has not raised nay (sic) other forms of relief for which he might wish to proceed and the Court will, based upon the respondent's admissions and concessions, and also evidence in the record at Exhibit 2 which the Court has spent time reviewing, the Court will enter an order of removal to India in this case. (Underline ours). Subsequently, he pretermitted Petitioner's adjustment application, and order the latter's removal from the country. Copy of the Immigration Judge's Decision is hereto attached as Appendix "I".

Petitioner timely filed an appeal to the Board of Immigration Appeals (BIA). On April 16, 2003, the BIA dismissed Petitioner's appeal, affirming the decision of the Immigration Judge. The BIA first recognized that Petitioner had conceded the removability charges, including that he was an "arriving alien" and removal under Sections 212(a)(6)(c)(i) and 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C.

Section 1182(a)(6)(C)(i), 1182(a)(7)(A)(i)(I). The BIA then held that the IJ was correct that he lacked jurisdiction to adjudicate Petitioner's application for adjustment of status notwithstanding the approved spousal visa petition on his behalf, since Petitioner is an "arriving alien" in removal proceedings. Copy of the BIA's decision is hereto attached as Appendix "J".

Petitioner filed a Petition for issuance of a writ of habeas corpus on May 2, 2003 with the District Cout for the Eastern District of Pennsylvania, alleging both factual and constitutional issues. Pending resolution of said petition, the District Court issued an injunction against Petitioner's final administrative order of deportation. However, in its order dated January 22, 2004, the District Judge denied said petition. Copies of the Petition for Habeas Corpus, and the decision of the District Court are hereto attached as Appendixes "K" and "L", respectively.

Upon denial of said habeas corpus petition, Petitioner appealed the District Court's decision to the Third Circuit Court of Appeals. He filed an Appeal Brief with the Court on June 1, 2004. Copy of said Appeal Brief is hereto attached as Appendix "M".

On August 27, 2004, the Third Circuit Court of Appeals dismissed Petitioner's appeal, and affirmed the order of the District Court. Petitioner then filed a timely Petition for Rehearing arguing that the panel decision is conflicting with existing statute, particularly, INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port

of entry … is subject to the provisions of INA § 212(a)]. On December 2, 2004, the Petition for Rehearing was denied. Copy of the Petition for Hearing is are hereto attached as Appendix "N".

ARGUMENT

I. Petitioner is not an "arriving alien", contrary to the ruling of the Third Circuit. Despite the admission of of the factual allegations in the amended NTA by Petitioner, the facts disclose that he is deemed to have already "entered" the US, albeit illegally, and is therefore eligible for the relief of adjustment of status. INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry … is subject to the provisions of INA § 212(a)], is the governing statute applicable to the instant case.

The facts of the instant case disclose that Petitioner initially entered the US on March 26, 1992 by crossing the border from Tijuana, Mexico, into San Diego, California, without being inspected by an immigration officer. He then applied for asylum in the US on December 17, 1992, but said application was denied on September 27, 1994 on the grounds that Petitioner has not established eligibility for such relief. On September 28, 1994, an Order to Show Cause and Notice of Hearing was issued, charging Petitioner with deportability on the grounds that he entered the US illegally.

On January 8, 1996, Petitioner attempted twice to enter the US, by driving into the US from Canada. However, he was refused admission on both occasions. As a consequence, he was issued on the same day, an Order to Show Cause and Notice of Hearing, and charged with being a deportable alien, who entered the US without inspection. While staying illegally in the US, petitioner re-applied for asylum on June 22, 1996, which was granted on July 30, 1996. On the basis of said asylum grant, Petitioner was able to apply for a travel document, and allowed to leave and re-enter the US legally and without any impediment. Hence, there is no doubt that he had been previously admitted to the US.

Petitioner is definitely not an "arriving alien", contrary to the asseveration of the Third Circuit. He is rather deemed to be an inadmissible (deportable) alien, who has effected "entry" to the US, by virtue of his previous multiple entries into the US, albeit illegally, and his grant of asylee status and advance parole. However, notwithstanding his illegal entry, Petitioner is still eligible for adjustment of status under **INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry ... is subject to the provisions of INA § 212(a)],** which is applicable to the case at bar.

On the other hand, the INS has not cited any provision of statute or law which declares that the revocation or termination of an individual's asylum status will automatically revert to the status of an "arriving alien". The Third Circuit also did not dwell on this particular legal issue

beyond stating that Petitioner had already conceded or admitted that he was an "arriving alien". A close scrutiny of said Third Circuit's decision will quite reveal that the Third Circuit had presumed that said Petitioner is an "arriving alien", based on his admissions of the material allegations of the amended NTA.

Truth to tell, Petitioner's status reverted to that of "an alien who entered the US without inspection ("EWI"), contrary to the findings of the Immigration Judge and the BIA, since it was admitted that he had entered the US illegally. As a matter of fact, even the Immigration Judge initially concluded that Petitioner "had been admitted to the United States but was deportable for a number of reasons. (IJ's Decision, Appendix "I", *supra*). However, the Immigration Judge reversed his own finding, only after the INS sought to amend the original charge sheet, and because Petitioner admitted the fact that he is an "arriving alien".

Petitioner contends likewise that the revocation of his asylee status does not change the fact that he had entered the US, albeit without inspection or authorization. As a matter of fact, this was proven when his wife petitioned for him while in the US, and that the same was granted by the INS. The Immigration Judge also recognized this fact when he acknowledged that Petitioner was married to a US citizen, and that Petitioner's wife had petitioned for him to become a permanent resident. Despite conceding to the amended charges, therefore, there is no cavil beyond doubt that Petitioner is statutorily categorized as deportable alien, since he entered the US without inspection.

"The entry doctrine fiction has always been the basis for determining when and under what circumstances persons are accorded due process in proceedings. Although the Immigration Reform Act (IIRIRA) has ended the traditional distinction between exclusion and deportation hearings *per se,* and replaced them with removal hearings, the entry doctrine may have continuing vitality in regard to whether full constitutional rights are given to someone if they are in the US even if they were not admitted. *Hoyte-Mesa v. Ashcroft*, 272 F. 3d 989 (7th Cir. 2001)."

Under the above-cited ruling of the Court of Appeals, Petitioner ratiocinates that, although he was not lawfully admitted to the US, because his status as an asylee had been revoked, he nevertheless could be deemed to have made an "entry" to the US, since he was "free from restraint" by the INS, and was "at liberty for some period of time" in the US. *Nyirenda v. INS*, 279 F.3d 620 (8th Cir. 2002) [holding that "such restraint does not arise where a person makes a landing and is at liberty for some period of time]. The fact that he got married to a US citizen, and have his marriage-based petition for immigrant visa be approved by the INS, is clear proof that he has made an "entry" into the US.

"The question of admission also arises in the context of an adjustment application. An adjustment of status is not deemed an entry (even though the grounds of inadmissibility are applicable), *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992); *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984). Nevertheless, the BIA has held that adjustment is an admission. *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999)."

Finally, Petitioner contends since he is not an "arriving alien", he is eligible for adjustment of status, and the Immigration Judge has acquired jurisdiction to hear arguments in favor of Petitioner's aforesaid application for adjustment of status. The Immigration Court should not have pretermitted the Petitioner's adjustment application, but should merely have required him to file a waiver of the ground of inadmissibility that was created when he lied to the INS about a previous asylum application.

II. Contrary to the Third Circuit's Decision, the Immigration Court has jurisdiction to adjudicate Petitioner's application for adjustment of status, due to the fact that he is eligible under 8 C.F.R. § 245.

Since Petitioner's immigration status has reverted to that of an EWI, rather than an "arriving" alien, he is covered by INA § 245(i)(1)(A)(i), 8 C.F.R. § 245.1, which provides that "an alien physically present in the United States, may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence." It is also noteworthy that Petitioner has an approved immigrant visa petition filed on his behalf on or before April 30, 2001, which made certain his eligibility to pursue said adjustment of status application under the statute. "All approved self-petitioners who applied for adjustment on or after January 14, 1998 or whose adjustment applications were pending on that date are eligible to adjust under INA §245(a) even if they entered without inspection or parole. They are also exempt from all bars to adjustment under INA § 245(c)." [p.539, 8th Ed., *Kurzban, "Immigration Law Sourcebook"*]. INA

§245(i) was extended up to April 30, 2001 for persons who were present in the U.S. on December 21, 2000. [*Legal Immigration Family Equity (LIFE)*].

Hence, Petitioner is not barred from seeking the relief of adjustment of status v1…2)the Immigration Judge, even when he was subsequently placed in removal proceedings.

8 C.F.R. § 245.2(a)(1) states that –

"(A)fter an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under Section 245 of the Act xx xx xx shall be made and considered only in those proceedings."

Furthermore, in *"Matter of Grinberg,"* 20 I&N Dec.911 (BIA 1994), the BIA had occasion to hold, thus -

"An immigration judge has jurisdiction to consider applications for adjustment of status under INA §245(i) filed by aliens previously ineligible under §245 (a) and §245 (c)."

There is no cavil of any doubt, therefore, that Petitioner's case falls within the purview of the above-quoted statute and case. It is worthy to note that, the approved family-based petition was issued in Petitioner's favor before the latter was placed in removal, and he availed of the benefit under 245(i) prior to its withdrawal or termination.

But even granting *arguendo,* without however admitting, that Petitioner can be classified an "arriving alien who is in removal proceedings", as charged in the amended NTA, he is still exempted, however, from the prohibition stated in 8 C.F.R. §245.1(c)(8), since he had re-entered the US on advance parole. Said exemption is clearly laid under 8 C.F.R. § 245.2(a)(1), which provides, thus -

"xxx xxx xxx An adjustment application by an alien **paroled under section 212(d)(5) of the INA,** which has been denied by the director, **may be renewed in removal proceedings** under 8 CFR part 240 only if:

"xx xx xx.

"(ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application." (Underline ours)

Said exemption is also found in INA § 1.1, 8 U.S.C. 1101, which defines an "arriving alien", thus -

"xx xx xx. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act." (Underline supplied).

In the case at bar, Petitioner's advance parole was granted to him, pursuant to his asylum protection previously obtained from the INS, since he was able to satisfy the "credible fear standard". As a consequence, Petitioner was paroled to the US to pursue his adjustment of status application. Contrary to Third Circuit's decision, the latter is not barred from proceeding with the case and decide upon the application for adjustment of status filed by Petitioner, since the exemption under the aforesaid provisions of law is applicable in the instant case. The INS' contention of lack of jurisdiction, therefore, is devoid of any merit. "An alien placed in removal proceedings for other grounds of inadmissibility or deportability may remain eligible to adjust their status. In these cases, a corresponding waiver under INA §§212(h) and (i) may be necessary to accomplish the adjustment before the immigration court. If the immigration judge grants the waiver, the application to adjust status will be granted in the exercise of discretion concurrently." [p.281, Vol 1, 2001-02 Immigration & Naturalization Law Handbook, AILA].

III. The Third Circuit should have remanded Petitioner's case to the Immigration Judge for further proceedings insofar as Petitioner's application for adjustment of status is concerned, since the immigration court obviously has jurisdiction to consider Petitioner's said application.

The Immigration Judge should not have pretermitted the Petitioner's adjustment application, but should have merely required him to file a waiver of the ground of

inadmissibility that was created when he lied to the INS about a previous asylum application. As discussed in the foregoing argument, the Immigration Judge had jurisdiction to consider the application for adjustment of status filed by Petitioner.

It must be noted that Petitioner had four (4) master calendar hearings. At his last master hearing on August 5, 1999, the Immigration Judge allowed Petitioner to file his application for adjustment of status under Section 245(i), and even scheduled an individual hearing for that purpose alone. On March 6, 2000, during the hearing on the merits, Petitioner was ready to present evidence in support of his said application. However, the INS objected to said presentation on the ground that there was an amended NTA filed against Petitioner. Evidently, this was the first time that Petitioner was informed of the new charges lodged by the INS, although he was not given the opportunity to make an intelligent response to said charges. Petitioner's counsel, who was also present during the hearing, was not able to explain to Petitioner the ramifications of the amended charges. Consequently, Petitioner admitted all the factual allegations contained in said NTA.

After the admission, the Immigration Judge thereupon brushed aside Petitioner's application for adjustment of status on the ground of lack of jurisdiction, without going into the merits of Petitioner's evidence. The BIA, on appeal, affirmed the Immigration Judge's decision, which was likewise sustained by the Third Cicuit.

Petititioner contends, however, that the Third Circuit should have remanded Petitioner's adjustment application to

the Immigration Judge for further proceedings, since it has jurisdiction over the case. Regulations require that the Immigration Judge to address said application, since Petitioner is entitled to that relief under INA Section 245(i), 8 U.S.C. Section 1255(i), which provides for the adjustment of status of certain aliens otherwise ineligible under Section 245(c), 8 U.S.C. Section 1255(c).

In the light of the foregoing, the decision of the Third Circuit must be vacated and the case remanded to allow the Immigration Judge to make a determination on whether the relief for adjustment of status being sought by Petitioner is warranded under the existing provision of law.

CONCLUSION

WHEREFORE, after a careful consideration of the merits of the instant petition, Petitioner respectfully prays to this Hon. Court to reverse, recall, or set aside the judgment of the Third Circuit, on the grounds that it is not in confirmity with above-cited provisions of law, and is not supported by evidence on the record, and to issue an Order remanding Petitioner's application for adjustment of status to the Immigration Judge, which has jurisdiction over the instant case, to conduct further proceedings, insofar as Petitioner's request for relief is concerned.

EPHRAIM TAHIR MELLA, ESQ.
Attorney for Petitioner
1814 Callowhill Street, First Floor
Philadelphia, PA 19130
Tel. (215) 640-9770

APPENDIX "A" - Judgment of the United States Court of Appeals for the Third Circuit
Denying the Appeal of Petitioner from the District Court's Denial of the
Petition for Habeas Corpus
Dated August 27, 2004

CPS-241 UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1501

RAJINDER SINGH,
a/k/a Satinger Singh,

Appellant

v.

JOHN ASHCROFT, IN HIS CAPACITY
AS ATTORNEY GENERAL, USA, ET AL.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ No. 03-2898)
District Judge: Honorable Charles R. Weiner

Submitted for Possible Summary Action
Under Third Circuit LAR 27.4 and I.O.P. 10.6
JULY 15, 2004

BEFORE: ALITO, FUENTES AND CHERTOFF,
CIRCUIT JUDGES
(Filed: August 27, 2004)

OPINION

PER CURIAM

Rajinder Singh appeals the dismissal of his habeas petition by the United States District Court for the Easter District of Pennsylvania, and the government seeks a summary affirmance. We wil grant the government's motion and summarily affirm.

I.

Rajinder Singh, a.k.a. Satinger Singh, entered the United States without inspection and sought asylum. In 1994, the Immigration and Naturalization Service ("INS")[1] denied asylum and issued an Order to Show Cause alleging the Singh was deportable for having entered the United States without inspection. In 1996, Singh again entered the United States without inspection and the INS issued another Order to Show Cause. This time Singh was granted asylum in July 1996. Sometime thereafter, Singh left the country,

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[1] Although the Department of Homeland Security took over the functions of the former INS in 2003, for the sake of convenience and because the INS was the actor at most times relevant herein, we will continue to refer to the agency as the INS.

returning in March 1997, allegedly pursuant to an advanced parole authorization. In March 1998, the INS issued a notice of intent to terminate Singh's asylum alleging that Singh had committed fraud in applying for asylum. Singh did not appear for the hearing, and his asylum was terminated on April 20, 1998.

A few months later, the INS issued a Notice to Appear, alleging that Singh was removable for having stayed beyond the period authorized. At a removal hearing held in December 1998, the INS served Singh's counsel with an Additional Charges of Inadmissibility/Deportability, which withdrew the initial charges and in lieu thereof charged Singh with removability for having committed fraud in seeking admission without proper documentation, under INA§ 212 (a)(6)(C)(i) (8 U.S.C. § 1182 (a)(6)(C)(i), and for seeking admission without proper documentation, under INA § 212 (a)(7)(A)(i)(I) (8 U.S.C§ 1182 (a)(7)(A)(i)(I)). The notice alleged, *inter alia*, that Singh was an arriving alien, had applied for admission as an asylee and was paroled into the United States under INA § 212(d)(5) (8 U.S.C § 1182 (d)(5). The removal proceedings were continued a number of times because Singh's wife, a lawful permanent resident and applicant for naturalization, had filed an I-130 alien relative petition on behalf of Singh. The alien relative petition was granted in May 1999, and shortly thereafter Singh applied for adjustment of status. In 2000, the Immigration Judge conducted another hearing and found that Singh, through counsel, had admitted the factual allegations and conceded the charge of removability, and thus, as an arriving alien the Immigration Judge lacked jurisdiction to consider the application for adjustment of status. The Immigration Judge entered an order of removal. The Board of Immigration Appeals ("BIA") affirmed, finding that the Immigration Judge had correctly

determined that it lacked jurisdiction over the adjustment application.

Singh did not file a petition for review in this Court, but rather filed a counseled habeas petition under 28 U.S.C. § 2241 in the District Court, alleging (1) that he was not an "arriving alien" and thus the Immigration Judge had jurisdiction over the adjustment application; and (2) that even if he was an "arriving alien", he was exempt from the jurisdictional bar. The District Court summarily dismissed the petition with prejudice for the reasons given in the government's opposition. Singh filed a timely appeal, and the government filed a motion for summary affirmance.[2]

II.

Singh's removal proceedings commenced before April 1, 1997 and the final order of removal was issued after October 230, 1996. Accordingly, this case is governed by the "transitional rules" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA § 309 (c) (1); Catney v. I.N.S., 178 F.3d 190, 192 (3d Cir. 1999), and our review of the District Court is plenary, Bakhtriger v. Elwood, 360 F.3d 414,417(3d Cir.2004). The BIA decision is reviewed for abuse of discretion and sufficiency of the evidence. See id. At 422-23 (discussing pre-IIRIRA and pre-AEDPA standard of

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[2] While the instant motion was pending, the Clerk's Office mistakenly issued a briefing schedule. After Singh filed his brief, the Clerk's Office issued an order staying and further briefing until disposition of this motion. Singh's brief was submitted to this Court for its information, As discussed *infra,* we have considered Singh's brief and the arguments made therein.

review).[3]

Pursuant to 8 C.F.R § 245 (a) (I), an Immigration Judge only has jurisdiction over the (1) adjustment application of an "alien, other than an arriving alien,... in removal proceedings"; or (2) the renewed adjustment application of certain parolees. As to the first clause, the BIA found that Singh, through counsel, had conceded that he was an "arriving alien".[4] An "arriving alien" remains such even if paroled pursuant to section 212 (d)(5) of the Act..." 8 C.F.R.§ 1001.1(q).[5] Furthermore, an arriving alien in removal proceedings is ineligible to adjust status. 8 C.F.R.§ 245.1 (c) (8). To the extent Singh denies having conceded

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[3] Accordingly, the District Court erred in adopting the giovernment's argument that review is limited to questions of constitutionality an dstatutory law. Such limited review is only applicable to removal proceedings commenced after April 1, 1997 and therefore subject to the "permanent rules" of IIRIRA. Bakhtriger, 360 F.3d at 423-24.

[4] An "arriving alien" is defined as:

> [A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien
> interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. § 1001.1(q)

[5] The exception to the definition of arriving aliens for certain paroled aliens is explicitly limited to the expedited removal proceedings under INA § 235(b)(1)(A)(i). See 8 C.F.R. § 1001.1(q).

to the charge of being an arriving alien, he has failed to provide any evidence to rebut the BIA and the Immigration Judge's findings.[6] Thus, the Immigration Judge lacked jurisdiction.

As to the second clause, Singh argues that even if he was an "arriving alien", the Immigration Judge has jurisdiction because he re-entered the United States on advance parole under INA § 212(d)(5)(8 U.S.C. § 1182(d)(5)). Appellant's Brief at 11 – 13. The parolee clause provides that an alien paroled under INA § 212(d)(5) may renew his adjustment application in removal proceedings if (a) the application was filed after his earlier inspection and admission, and (b) the applicant's later absence and return to the United States was pursuant to an advance parole authorization. 8 C.F.R. § 245.2(a)(1). Singh's multiple entries into the United States prior to the 1997 advance parole were made without inspection, and thus the parolee clause is inapplicable.

Singh also argues that he is entitled to adjustment of status under INA § 245(i)(8 U.S.C. § 1255(i), which provides for the adjustment of status of certain aliens otherwise ineligible under § 245(c)(8 U.S.C. § 1255(c). Appellant's Brief at 10-11. We need not address this argument because regardless of whether Singh is entitled to relief under §245(i), as discussed the Immigration Judge lacked jurisdiction to consider the application.

Accordingly, the BIA acted within its discretion in dismissing the appeal. As we find no substantial issues, we will summarily affirm the District Court's order.

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[6] In light of Singh's concession, we need not address Singh's argument that he was not in fact an arriving alien.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1501

RAJINDER SINGH,
a/k/a Satinger Singh,

Appellant,

v.

JOHN ASHCROFT, IN HIS CAPACITY
AS ATTORNEY GENERAL, USA, ET AL.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 03-2898
District Judge : Honorable Charles R. Weiner

Submitted For Possible Action
Under Third Circuit LAR 27.4 and I.O.P. 10.6
July 15, 2004

BEFORE : ALTO, FUENTES AND CHERTOFF,
CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the

United District Court for the Eastern District of Pennsylvania and was submitted for possible summary action under Third Circuit LAR 27.4 and I.O.P. 10.6. On consideration whereof, it is now here ORDERED AND ADJUDGED by this court that the judgment of the district court entered on January 23, 2004 be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

DATED: August 27, 2004

APPENDIX "B" - Order of the United States Court of Appeals for the Third Circuit
Denying Panel Rehearing
Dated December 2, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1501

RAJINDER SINGH,
a/k/a Satinger Singh,

Appellant

v.

JOHN ASHCROFT, IN HIS CAPACITY
AS ATTORNEY GENERAL, USA, ET AL.

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH, McKEE,
RENDELL, BARRY, AMBRO, FUENTES, SMITH,
CHERTOFF, FISHER, and VAN ANTWERPREN, *Circuit Judges,*

The petition for rehearing filed by Appellant Rajinder Singh in the above-entitled case having been submitted to the judges who participated in the decision of this Court and

to all the other available circuit judges of the Circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc* is denied.

BY THE COURT

/s/ Michael Chertoff

_____

Circuit Judge

Dated: December 2, 2004
SLC/cc. Ephraim T. Mella, Esq.
K.T. Newton, Esq.

3-A

APPENDIX "C" - Notice to Appear
July 22, 1998

Removal Proceedings under Section 240 of the Immigration and Nationality Act

File No. A75 018 954

In Matter of :

Respondent : SINGH, Rajinder, currently residing at : 2020 Arthur St., 2nd Floor, Philadelphia, PA 19152-0000

___ 1. You are an arriving alien.
___ 2. You are an alien present in the United States who has not been admitted or paroled.
_x_ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1) You are not a citizen or national of the United States;
2) You are a native of INDIA and a citizen of INDIA;
3) You were admitted to the United States at NEW York, NY (IA) on or about March 4, 1997 as a nonimmigrant parolee with authorization to remain in the United States for a temporary period not to exceed March 25, 1997;
4) You remained in the United States beyond March 25, 1997 without authorization from the Immigration and Naturalization Service.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted.

___This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

___Section 235(b)(1) order was vacated pursuant to: ___8 C.F.R. 208.30(f)(2) ___8 C.F.R. 235.3(b)(5)(iv).

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at 1600 Callowhill St., Suite 400, Philadelphia, PA 19130-0000 on 09 September 1998 at 2:00 p.m. to show why you should not be removed from the United States based on the charge(s) set forth above.

Date : 22 JUL 1998

_____
Signature and Title of Issuing Officer

SAN FRANCISCO, CA
City and State

4-A

APPENDIX "D" - Additional Charges of Inadmissibility/Deportability
Dated December 2, 1998

In : Removal proceedings under Section 240 of the Immigration and Nationality Act

Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act

In the Matter of :

Alien/Respondent: Rajinder SINGH, a.k.a. Satrinder SINGH

File No. A 75 018 954 Address : 2020 Arthur St. , 2nd Floor, Philadelphia, PA 19152

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provisions(s) of law:

Section 212 (a)(6)(C)(i) of the Immigration and Nationality Act ("Act"), as amended, in that you are an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act.

212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("Act"), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid

unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or other document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

The charge under section 237(a)(1)(B) of the Immigration and Nationality Act is hereby withdrawn. In support of the additional charge(s) there is submitted the following factual allegation(s) / / in addition to / / in lieu of those set forth in the original charging document:

The following factual allegations are in lieu of those set forth in the Notice to Appear dated July 22, 1998 :

1. You are an arriving alien;
2. You are not a citizen or national of the United States;
3. You are a native of India and a citizen of India;
4. You applied for admission to the United States as an asylee and were paroled into the United States pursuant to section 212(d)(5) of the Immigration and Nationality Act.

Dated : December 2, 1998 Signature of Service Counsel

BEST AVAILABLE COPY

5-A

APPENDIX "E" - Record of Deportable Alien
Dated January 8, 1996

						31k	Eyes: Brn	Complexion: MED
Country of Citizenship: India	Passport Number and Country of Issue: H195567 India	File Number: A72368916				Height: 5'10	Weight: 195	Occupation: Unemployed
U.S. Address (Residence) (Number) (Street) (City) (State) (Zip Code): 2020 Arthur Street Philadelphia, PA 19152						Scars or Marks: None Visible		
Date, Place, Time, Manner of Last Entry: 01/08/1996, EWI-CAN, At/Near ABG Port of Entry					Passenger Boarded At	F.B.I. No.: 391293WA1	Marital Status: ☐ Single ☐ Separated ☐ Widow(er) ☒ Married ☐ Divorced	
Number, Street, City, Province (State) and Country of Permanent Residence: Hs 5132 Str #1 Krisnan Nagar New Delhi 5, India						Method of Location: BP/PATROL BORDER		
Birthdate: 06/26/1959 (37)		Date of Action: 01/08/1996		Location Code: SWB/CNB		(Port Name): ROUSES POINT	Date & Hour: 01/08/1996 03:4	
City, Province (State) and Country of Birth: New Delhi, India		AR: X	Form: (Type & No.)	☐ Lifted ☐ Not Lifted		By: Weldon, Steblein		
Visa Issued At—NIV No.: Ina New Delhi		Social Security Account Name: Satinder Singh				Status at Entry: EWI-CAN	Status When Found: Travel / Seeki	
Date Visa Issued: 06/14/1991		Social Security No.: 638-18-0058		Send C.O. Rec. Check To: BUF		Length of Time Illegally in U.S.: At Entry		
Immigration Record: CIS: POSITIVE SEE NARR				Criminal Record: None				
Name, Address, and Nationality of Spouse (Maiden Name, if appropriate): Hasina/Usc/Sfa , SAS.						Number & Nationality of minor Children: 1-Usc		
Father's Name, and Nationality and Address, if Known: Ajid/India/Dec						Mother's Present and Maiden Names, Nationality, and Address, if Known: Sarbjid/India/India		
Monies Due/Property in U.S. Not in Immediate Possession: ☒ None Claimed ☐ See Form I-43		Fingerprinted: ☒ Yes ☐ No		Lookout Book Checked: ☒ Not Listed ☐ Listed, Code ____		Deportation Charge(s) (Code Words): D1B		
Name and Address of (Last) (Current) U.S. Employer		Type of Employment: Unemployed		Salary: $ 0.00		From: To:		

Narrative (Outline particulars under which alien located, XXXXXXXX Include details, not shown above, re time, place, manner of last entry, and elements which establish deportability, admissibility, immunities and/or criminal violation. Indicate means and route of travel to interior) Alien has been advised of communication privileges pursuant to 8 CFR 242.2(
Initial jjw Date 1-8-96

AKA:

ENTRY: Subject crossed the U.S. border on the River Road, an unguarded highway near POE Alburg, Vermont, driving a 1995 red Pontiac Grand Am, NJ registration GG 703H, alone.

APPREHENSION: State Route 9B and 11, Rouses Point, New York.

D1B: Subject was observed by remote monitoring devices, and admitted to, entering the U.S. on an unguarded road, without reporting for Immigration Inspection as required, in violation of law.

INTEL/OTHER: Subject was found to have been refused admission to the U.S. at POE Champlain, NY at approximately 12:15AM, driving the same vehicle. Subject had presented valid PP & NIV; SINGH was refused under Sec. 212(a)(7)(A)(i)(I). He was found to be not possession of a Form I-512(application for parole), and allegedly denied his status in the U.S. as an asylum applicant. Inspectors stated he had become unruly, and was escort to Canada Immigration. CONTINUED
CNB 96 134

James J. Weldon
(Signature and Title)

(If space insufficient, show "continued" and continue on reverse, from bottom up)

DISTRIBUTION

Orig: A File
cc : CPA/SWB
cc : Intel

Received (XXXXXXX

APPENDIX "F" - Notice To Grant Asylum
Dated August 13, 1996

US DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ASYLUM OFFICE
P.O. BOX 77530
SAN FRANCISCO, CA 94107

A 75 018 954
ZSF – 006

Date : AUG 13, 1996

MR. RAJINDER SINGH
39505 Trinity Way Apt. 15
Fremont CA 94539

Dear Mr. Singh :

This refers to your request for Asylum in the United States, Form I-589.

It has been determined that you have established a well-founded fear of persecution upon return to your homeland. Therefore, in accordance with Section 208(a) of the Immigration and nationality Act, your request for asylum is granted as of July 30, 1996.

This grant is valid for an indefinite period and includes any spouse or child present in the United States who was included

in your application, and for whom you have provided a preponderance of evidence to establish a qualifying relationship. In order to request derivative asylum status for any spouse or child who was not included in your asylum request, you must file Form I-730 with the Nebraska Service center, P.O. Box 87730, Lincoln, NE, 68501-7730. Forms I-730 and filing instructions can be obtained a your local INS office.

You are granted employment authorization for as long as you remain in asylum status. You may apply for and obtain an employment Authorization document (EAD) as evidence of your eligibility to working the United States. Such documentation may be obtained by filing Form I-765 with the appropriate INS office, pursuant to the instructions on the form. Forms I-765 and filing instructions can be obtained at your local INS office.

If you plan to depart the United States, you must first obtain a refugee travel document by filing Form I-131 with the Immigration Service Office having jurisdiction over your place of residence.

After having been physically present in the United States for a period of one year subsequent to the date your asylum status was granted, you may apply for lawful permanent residence under Section 209(b) of the Immigration and Nationality Act.

Please be advised that the United States law requires any male in your family who has been granted asylum and who is between the ages of eighteen (18) and twenty-six (26) to register with the Selective Service. You may obtain information on how to register at your nearest post office.

APPENDIX "G" - San Francisco Asylum Office Memorandum
Dated May 15, 1998

SAN FRANCISCO ASYLUM OFFICE

Subject: Date : May 15, 1998
Rajinder Singh/A-75-018-954
Satrinder Singh/A-75-018-954, One and Same Person

To File/TA From : San Francisco Asylum Office/C. Gadye

The FBI report on the fingerprints submitted by Rajinder Singh/A-75 018 954 indicates that he filed another asylum application on May 12, 1994, under the name Satrinder Singh/ A-75 018 954. Applicant was a no-show at ZNK and an OSC was personally served on him, with a hearing date to be calendared. There was no follow-up on Applicant's hearing before the IJ. The report also indicated that Subject was arrested in Philadelphia on July 8, 1994 for assault. He applied for asylum a second time using the name Satrinder Singh/A-75 018 954, on June 22, 1996, and was interviewed at ZSF. He was granted asylum on July 30, 1996. Applicant received notice of a revocation hearing to be held on April 20, 1998, but failed to attend. His asylum grant was revoked. Effective April 20, 1998.

APPENDIX "H" - Notice of Termination of Asylum Status
Dated April 20, 1998

US DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ASYLUM OFFICE
P.O. BOX 77530
SAN FRANCISCO, CA 94107

A75 018 954 Date : APR 20, 1998
ZSF-063

RAJINDER SINGH
2020 Arthur St., 2nd Flr.
Philadelphia, PA 19152

Dear Mr. Singh :

By letter dated March 3, 1998, you were advised of the intent of the Immigration and Naturalization Service to terminate your grant of asylum for the reasons stated therein. You were scheduled for a hearing before an Asylum Officer on April 20, 1998, at 10:00 a.m. The purpose of this letter is to notify you that the Immigration and Naturalization Service has terminated your grant of asylum and employment authorization document, effective April 20, 1998.

In accordance with Title 8, Code of Federal Regulations, Section 208.22(a) asylum status may be terminated if it is established that an alien is not eligible for asylum due to fraud. You failed to appear on the date of your scheduled re-

interview. Following careful review of your file, the Service has determined that you are not eligible for asylum for the reasons stated in the notice of intent to terminate.

Consequently, your asylum status, together with any work authorization that has been issued pursuant to Title 8 Code of Federal Regulations, Section 247a.12(a)(5) have been terminated, and you are returned to the status you would have had if you had not been granted asylum. As you are no longer in legal status, you are amenable to removal.

There is no appeal from this decision. Please find enclosed Form(s) I-862, Notice to Appear, placing you (and any members of your family included in your asylum request) in removal proceedings. You may renew your request for asylum before an Immigration Judge in these proceedings.

Your may apply to the Immigration Judge for employment authorization pursuant to 8 C.F.R. 274a.12(c)(9), after renewing your asylum application before the Immigration Court. The Immigration Court having jurisdiction over your place of residence is listed on page one of the enclosed Notice to Appear.

You are directed to report any changes of address to the Office of the Immigration Judge listed on page one of the Notice to Appear.

Please make reference to the file number(s) listed above in any future correspondence or contact with the Service.
Sincerely,

Larry F. Crider
Director
San Francisco Asylum Office

APPENDIX "I" - Oral Decision of the Immigration Judge Dated March 6, 2004

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

FILE NO. : A 75 018 954 MARCH 6, 2004

IN THE MATTER OF

RAJINDER SINGH,) IN REMOVAL
PROCEEDINGS)
Respondent)

CHARGE :

APPLICATION :

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE

Rana Taj, Esquire Pamela Ransome,
Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

So just a summary order for the record on July 22nd, the year 1998, the Immigration and Naturalization Service issued Form I-862, Notice to Appear, in the name of the respondent, Rajinder Singh, A 76 018 954.

In the Notice to Appear, it was alleged that the respondent had been admitted to the United States but was deportable for a number of reasons. At a master listing on September the 19th, 1998, the matter was continued to afford the respondent the opportunity to obtain counsel. On December 2nd, 1998, the respondent did appear with counsel and, at that time, counsel was served with an evidentiary packet from the Government which has been marked by the court as Exhibit 2 which is tabbed items one through five which includes a new charging document, a Form I-261 which withdrew the allegations and the legal charges on the former charging document and charges the respondent as an arriving alien, he is not a citizen or national of the United States, he is a native and citizen of India, he applied for admission as an asylee and was paroled into the United States pursuant to Section 212 (d) (5) and that on July 30th, 1996, he sought to procure an entry document of some type of by fraud or willful misrepresentation and that he did not inform an asylum officer that he had already been placed in deportation proceedings under a different name and A number and also that there had been an arrest in 1994 for a criminal charge.

The matter has been set down for a number of calendars because the Court was informed that the respondent was married to a lawful permanent resident and that she had petitioned for naturalization and that that naturalization was forthcoming and she had also petitioned a Form I-130, alien relative petition for the respondent and that it had been approved as of May the 5th, 1999. The matter has been continued until today, March the 6th, the

year 2000, and on this date, the respondent, through counsel, pleaded to the charging document at Exhibit 2, the Form I-261, and admitted the factual allegations and conceded the charge of removability. The Court must find, as there has been a discussion on the record here, that the Court has no jurisdiction over an adjustment application which is pending and also that the respondent, as an arriving alien, is not eligible for voluntary departure. He has not raised any other forms of relief for which he might wish to proceed and the Court will, based upon the respondent's admissions and concessions, and also evidence in the record at Exhibit 2 which the Court has spent time reviewing, the Court will enter an order of removal to India in this case.

PAUL GRUSSENDORF
Immigration Judge

APPENDIX "J" - Decision of the Board of Immigration Appeals
Dated April 16, 2003

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File : A75 018 954 – Philadelphia Date : APR 16, 2003

In re : RAJINDER SINGH a.k.a. Satinder Singh

IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT : Gregg C. Felixon, Esquire

ORDER :

PER CURIAM. We affirm the March 6, 2000, decision of the Immigration Judge, which found that the respondent was removable on the lodged charges and that he did not demonstrate eligibility for relief. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994)(noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon eview of the record coincide with those which the Immigration Judge articulated in his or her decision"). At the hearing on December 2, 1998, the Immigration and Naturalization Service ("the Service," now within the Department of Homeland Security, "DHS") withdrew the Notice to Appear (NTA) and served the respondent with the

Form I-261 lodging document (Tr. at 6). The lodging document contains new factual allegations to replace those on the NTA. At the continued hearing on March 6, 2000, the respondent's former counsel admitted the allegations and conceded the removability charges on the lodging document, including that the respondent is an "arriving alien" and is removable under Sections 212(a)(6)(C)(i) and 212)a)(7)(A)(i)(l) of the Immigration and Nationality Act, 8 U.S.C. §§1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(l). *See* Tr. at 15, 17. The Immigration Judge correctly determined that he lacked jurisdiction to adjudicate the respondent's application for adjustment of status notwithstanding the approved spousal visa petition on his behalf, since the respondent is an "arriving alien" in removal proceedings. *See* section 245 Act, 8 U.S.C. § 1255; 8 C.F.R. § 245.1(c)(8)(2002)(now renumbered as 8 C.F.R. § 1245.1(c)(8). To the extent that the respondent alleges that he received ineffective assistance from his prior attorney, the respondent has not complied with Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff 'd*, 857 F.2d 10 (1st Cir. 1988). Accordingly, the appeal is dismissed.

FOR THE BOARD

APPENDIX "K" - Petition for Habeas Corpus
Dated May 2, 2003

EPHRAIM TAHIR MELLA, ESQUIRE
Law Offices of Tahir Mella
1822 Spring Garden Street
Philadelphia, Pennsylania 19130
Tel. (215) 564-9744
Attorney for Plaintiff-Petitioner

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAJINDER SINGH a.k.a. SATINGER SINGH	**Civil Action No._ For : Habeas Corpus**
Plaintiff-Petitioner,	**A# 75-018-954**
JOHN ASHCROFT,in his capacity as Attorney General, USA, et al.	
Defendants-Respondents.	

PETITION

PETITIONER RAJINDER SINGH ("Singh"), by

counsel, to this Honorable Court, respectfully **FILES** this **PETITON FOR HABEAS CORPUS**, on the following grounds, thus -

1. Petitioner Singh is of legal age, native of India, married to a US citizen, and residing at 8801 Fairfield Street, Philadelphia, PA 19121, and may be served with notices and legal processes through his undersigned counsel at c/o 1822 Spring Garden Street, Philadelphia, PA 19130.

2. Respondents Attorney General, District Director and other officers in charge of the Department of Homeland Security (DHS), where the administrative record of petitioner may be found, are all being sued in their respective capacity, and may be served with individual summons, notices and other processes of this Court, in Philadelphia, Pennsylvania.

3. On March 6, 2000, the Hon. Immigration Judge, Paul Grussendorf, sitting at Philadelphia, Pennsylvania, rendered the questioned Decision in the above-entitled case, an excerpt of which reads as follows, thus –

> The matter has been set down for a number of calendars because the Court was informed that the respondent was married to a lawful permanent resident and that she had petitioned for naturalization and that that naturalization was forthcoming and she had also petitioned a Form I-130, alien relative petition for the respondent and that it had been approved as of May the 5th, 1999. The matter has been continued until today, March the 6th, the year 2000, and on this date, the respondent, through counsel, pleaded to the charging document at

Exhibit 2, the Form I-261, and admitted the factual allegations and conceded the charge of removability. *The Court must find, as there has been a discussion on the record here, that the Court has no jurisdiction over an adjustment application which is pending and also that the respondent, as an arriving alien, is not eligible for voluntary departure*. He has not raised nay (sic) other forms of relief for which he might wish to proceed and the Court will, based upon the respondent's admissions and concessions, and also evidence in the record at Exhibit 2 which the Court has spent time reviewing, the Court will enter an order of removal to India in this case. (Underline ours)

4. The facts of the instant case are undisputed.

Petitioner entered the United States as an asylee, and thereafter, was paroled in as such, on March 4, 1997. Subsequently, his grant of asylum was revoked on March 3, 1998. In the **first** Notice of Appear (NTA) dated July 22, 1998, it was alleged that petitioner was admitted to the U.S. but is deportable for a number of reasons. During the master calendar hearing (MCH) of his removal from the U.S., the DHS (formerly "INS") requested for marking of Exhibit 2, containing items 1 – 5, inclusive, consisting of, among others, a new NTA which superseded the former NTA, and hereafter alleged that petitioner is an arriving alien; that he is not a citizen or national of the U.S., but of India; that he applied for admission as an asylee and was paroled into the U.S. pursuant to Section

212(d)(5); that prior to that, on July 30, 1996, he attempted to seek entry by means of a fraudulent document; that he failed to inform the asylum officer that he used a different name and alien number when placed in a prior deportation proceedings; and that he was arrested in 1994 for a criminal offense. Petitioner, however, disputed these assertions, on the ground of lack of previous knowledge thereof, and failure to afford him the opportunity to rebut the same.

5. Invoking Section 212a(7)(A)(i)(I), the DHS accused petitioner of seeking admission to the US without proof of valid entry documents. Petitioner countered, on the other hand, that he had been lawfully admitted to the US, by being paroled as an asylee, albeit subsequently revoked by the DHS. Further, he asserted that he has a pending application for adjustment of status, based on an approved Form I-130 (Petition for Alien Spouse), which his US citizen wife filed in his favor, and that same was not adjudicated by the Immigration Judge.

As earlier stated, said Immigration Judge nevertheless ruled in favor of the DHS, denying petitioner's application for adjustment of status for lack of jurisdiction, and ordered his removal to India.

6. Petitioner invokes the jurisdiction of this Honorable Court, by way of the instant petition for *habeas corpus*, to overrule the questioned decision of the Immigration Judge declaring that it has no jurisdiction to decide over said petitioner's adjustment of status application, and consequently, to nullify the proceedings therein which granted his removal, on the precept that said removal will

unjustly curtail, nay deprive, him of his freedom and liberty to traverse the charges leveled against him, and render *functus officio* aforesaid pending application.

7. Petitioner posits the view that he has been lawfully admitted to the U.S., through advance parole, on March 4, 1997, pursuant to his asylee status. Contrary to the DHS' stand, petitioner possessed valid travel papers at the time of his admission to the country. Thus, he cannot be deemed an alien seeking to gain admission for the first time in the US. While it is true that petitioner may have conceded the charge of removability before the Immigration Judge, on the basis of DHS' allegation that his asylum status had been revoked, the record will reveal, however, that prior to said revocation, he legally entered the US at a port of entry; been inspected and authorized by an immigration officer; found eligible and granted asylum by the DHS itself, and re-entered the US on advance parole. Undoubtedly, these factors should have weighed in favorably for the grant of petitioner's application for adjustment of status.

8. Not only has petitioner been granted parole, and is considered a lawfully admitted alien, petitioner contends, furthermore, that his Form I-130 petition filed by his US citizen wife was approved, thus protecting his status under INA § 245 (i), and making him eligible to apply for adjustment thereof.

8 C.F.R. § 245.2(a)(1) states that –

> "(A)fter an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under Section 245 of the Act xx xx xx shall be made and

considered only in those proceedings."

> "All approved self-petitioners who applied for adjustment on or after January 14, 1998 or whose adjustment applications were pending on that date are eligible to adjust under INA §245(a) even if they entered without inspection or parole. They are also exempt from all bars to adjustment under INA § 245(c)."[p.539, 8th Ed., Kurzban, "Immigration Law Sourcebook"]. INA §245(i) was extended up to April 30, 2001 for persons who were present in the U.S. on December 21, 2000. [Legal Immigration Family Equity (LIFE)].

Furthermore, in "Matter of Grinberg," 20 I&N Dec.911 (BIA 1994), the BIA had occasion to hold, thus -

> "An immigration judge has jurisdiction to consider applications for adjustment of status under INA §245(i) filed by aliens previously ineligible under §245 (a) and §245 (c)."

There is no cavil of any doubt, therefore, that petitioner's case falls within the purview of the above-quoted statute and case. It is worthy to note that, the approved family-based petition was issued in petitioner's favor before the latter was placed in removal, and he availed of the benefit under 245(i) prior to its withdrawal or termination.

9. But even granting *arguendo,* without however admitting, that petitioner can be classified an "arriving alien who is in removal proceedings", as charged by the DHS, he is still exempted, however, from the prohibition stated in 8 C.F.R. §245.1(c)(8), since he had re-entered the US on

advance parole. Said exemption is clearly laid under 8 C.F.R. § 245.2(a)(1), which provides, thus -

> "xxx xxx xxx An adjustment application by an alien **paroled under section 212(d)(5) of the INA,** which has been denied by the director, **may be renewed in removal proceedings** under 8 CFR part 240 only if:
>
> "xx xx xx.
>
> "(ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application." (Underline ours)

Said exemption is also found in INA § 1.1, 8 U.S.C. 1101, which defines an "arriving alien", thus -

> "xx xx xx. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act." (Underline supplied).

10. In the case at bar, petitioner's advance parole was granted to him, pursuant to his asylum protection previously obtained from the DHS, since he was able to satisfy the

"credible fear standard". As a consequence, petitioner was paroled to the US to pursue his adjustment of status application. Contrary to the IJ's decision, the latter is not barred from proceeding with the case and decide upon the application for adjustment of status filed by petitioner, since the exemption under the aforesaid provisions of law is applicable in the instant case. The DHS's contention of lack of jurisdiction, therefore, is devoid of any merit. "An alien placed in removal proceedings for other grounds of inadmissibility or deportability may remain eligible to adjust their status. In these cases, a corresponding waiver under INA §§212(h) and (i) may be necessary to accomplish the adjustment before the immigration court. If the immigration judge grants the waiver, the application to adjust status will be granted in the exercise of discretion concurrently." [p.281, Vol 1, 2001-02 Immigration & Naturalization Law Handbook, AILA].

11. There is no speedy, adequate and immediate remedy available to petitioner, and his imminent removal will pose continuing hardship and suffering on his person. He is definitely not a flight risk or a risk to the community, and commits to make himself available to the Court, when required to do so.

12. Habeas corpus has not been abolished under the Anti-Terrorist and Effective Death Penalty Act (hereinafter "AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act (hereinafter "IIRAIRA") to review constitutional and statutory claims and that habeas applies to review the "legal validity" of a final order of removal even in the face of preclusion statutes. *INS v. St. Cyr*, 121 S.Ct. 2271, 2278-88 (2001). This includes questions of law that arose in the context of discretionary relief." *Id.* at 2283. The Supreme Court also reaffirmed the supremacy of

habeas corpus in the review of Executive detention in Zadvydas v. Davis, 121 S.Ct. 2491, 2497-98 (2001)["We conclude that §2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention"].

WHEREFORE, it is respectfully prayed that this Honorable Court grant petitioner's request for issuance of a *writ of habeas corpus* directing all persons or any officer having jurisdiction over the instant case, against unlawfully restraining or depriving petitioner of his right to liberty from being removed to India, and to enforce his statutory and discretionary right to seek adjustment of status, based on an approved I-130 petition. As an ancillary relief, to order the *status quo* of the case, reversing the adverse decision of the IJ, and remanding the case for further proceedings. Petitioner prays for such other relief as may be just and equitable under the circumstances.

_____

Ephraim Tahir Mella, Esquire,

CERTIFICATE OF SERVICE

RAJINDER SINGH a.k.a. SATINDER SINGH Plaintiff-Petitioner,	)	Civil Action No._____
	)	**A# 75-018-954**
v. **JOHN ASHCROFT**,in his capacity as Attorney General, USA Defendants-Respondents	)	**HABEAS CORPUS**

I HEREBY CERTIFY that on this 2nd day of May, 2003, I caused to be served the:

ENTRY OF APPEARANCE OF COUNSEL
PETITION FOR HABEAS CORPUS

_____ by HAND DELIVERY to the person/s at the address set forth below.

_____ by regular mail to the person/s at the address set forth below.

The Hon. John Ashcroft
United States Department of Justice
Office of Immigration Litigation
Ben Franklin Station
P.O. Box 878, Civil Division
Washington, D.C. 20044

Office of the District Counsel
Immigration and Naturalization Service
1600 Callowhill Street, Philadelphia, PA 19130

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 2, 2003.

_____

Ephraim Tahir Mella, Esquire,

APPENDIX "L" - Order of the District Court for the Eastern District of Pennsylvania
Dated January 22, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAJINDER SINGH a.k.a	:	
SATINGER SINGH	:	
Petitioner,	:	
v.	:	
	:	**CIVIL ACTION**
	:	**NO.03-2898**
JOHN ASHCROFT, in his	:	
capacity as	:	**A75-018-954**
Attorney General, USA,	:	
et al.,	:	
Respondents.	:	

ORDER

AND NOW, this 22nd day of January, 2004, upon consideration of the Petition for Writ of Habeas Corpus of Rajinder Singh, a.k.a Satinger Singh, and the Government's opposition thereto, for the reasons stated in the Government's opposition, it is HEREBY ORDERED that the Petition is dismissed with prejudice.

BY THE COURT:

CHARLES R WEINER
Judge, United States District Court

APPENDIX "M" - Appeal Brief to the Third Circuit, Court of Appeals
Dated June 1, 2004

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I

Whether or not the District Court gravely erred in sustaining the argument of respondent Attorney General that petitioner is an inadmissible alien,

hence deemed an arriving alien, considering that he had misrepresented a material fact to procure admission into the US.

II

Whether or not petitioner is entitled to the relief prayed for, i.e, adjustment of status, considering that he has an approved relative visa petition from the DHS.

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Timeliness of the Petition

Pursuant to this Hon. Court's Briefing and Scheduling Order dated April 23, 2004, petitioner has met the deadline for filing of abovesaid appeal brief on June 2, 2004.

Statement of Jurisdiction

Jurisdiction of this Honorable Court to entertain the instant petition for review of the decision of the BIA, is provided for under INA §242(a),(b), 8 U.S.C. §1252 (a), (b).

Statement of the Issues

As culled from the facts of this case, the issues to be resolved are as follows, to wit -

1. Whether or not the District Court gravely erred in sustaining the argument of respondent Attorney General that petitioner is an inadmissible alien, hence deemed an arriving alien, on the alleged ground that he had misrepresented a material fact to procure admission into the US.

2. Whether or not petitioner is entitled to the relief prayed for, *i.e,* adjustment of status, considering that he has an approved relative visa petition from the DHS.

Statement of the Case and Facts

Petitioner, Singh is from India, entered the U.S. initially in 1992 under the name Satinder Singh, (his real name) on a B-1/B-2 visa. Mr. Singh applied for political asylum in New Jersey in 1994. This was subsequently withdrawn.

Mr. Singh applied again for political asylum in San Francisco under the name "Rajinder Singh." This was granted initially at the asylum office level but revoked subsequently on March 3, 1998, because Mr. Singh failed to disclose that he had previously filed for asylum under a different name.

While the asylum grant was still valid – that is, before it was revoked, Mr. Singh applied for a travel document (advanced parole) and traveled to Nepal. He returned to the United States and was admitted on March 4, 1997.

On August 11, 1992, Mr. Singh was married to Ms. Hasina Yousuf (now a U.S. citizen.) An I-130 Immediate Relative Petition with a priority date of January 12, 1998 was approved on April 23, 1998.

The INS issued a Notice to Appear on July 22, 1998 charging Mr. Singh with removability as an overstay only. Mr. Singh then applied for adjustment of status under 245(i) on August 5, 1999. However, on March 6, 2000, upon an amended NTA charging Mr. Singh as removable as an arriving alien, and without giving Mr. Singh the opportunity to rebut the allegation, Philadelphia Immigration Judge Paul Grussendorf ordered Mr. Singh's removal, citing the latter's inability to file for adjustment of status as an arriving alien. Judge Grussendorf then pretermitted Mr. Singh's adjustment application. Petitioner averred, as he does now, that the Immigration Court should not have pretermitted the adjustment application, but merely should have required the filing of an I-601 Application for Waiver of Grounds of

Inadmissibility for the fraud on the political asylum.

In the amended Notice to Appear dated December 2, 1998, petitioner was charged with removability on the following grounds to wit : a) that petitioner is an arriving alien; b) that he is not a citizen or national of the US; c) that he is a native of India and a citizen of India; d) that he applied for admission to the US as an asylee, and was paroled into the US pursuant to Sec. 212(d)(5) of the INA; and e) that on July 30, 1996, petitioner sought to procure xx xx admission into the US by xx xx misrepresenting a material fact, to wit: during the course of his interview in support of petitioner's asylum application, he did not inform the asylum officer that he was previously placed in deportation proceedings under the name of Satinder Singh xx xx, and that petitioner had been arrested for assault in 1994.

On the other hand, record will disclose that petitioner was granted asylee status on July 30, 1996, but his asylum was later terminated by the DHS, for his failure to appear during the scheduled interview with the asylum officer, and to present evidence in rebuttal of the notice to terminate his asylee status. Petitioner, moreover, alleges that prior to the hearing on April 20, 1998 with said officer, he sent a letter dated March 11, 1998, addressed to the DHS in San Francisco, California, requesting for a change of venue of said interview on the ground of undue hardship. However, said change of venue was denied by the DHS, in its letter dated April 16, 1998. Subsequently, petitioner was placed in removable proceedings, and after trial, was ordered deported by the Immigration Judge. According to the immigration court, "respondent, through

counsel, pleaded to the charging document at Exhibit 2, the Form I-261, and admitted the factual allegations and conceded the charge of removability. (N.B. Petitioner, however, disputed these assertions, on the ground of lack of previous knowledge thereof, and failure to afford him the opportunity to rebut the same.) On appeal, the BIA affirmed the adverse decision of the Immigration Judge. On May 1, 2003, petitioner filed a *habeas corpus* petition with the District Court for the Eastern District of Pennsylvania, alleging both constitutional and legal issues. Pending resolution of said petition, said court issued an injunction against petitioner's final administrative order of deportation. However, in its order dated January 22, 2004, the District Judge denied said petition. Hence, this appeal.

Statement of Related Cases and Proceedings

Petitioner certifies that, with regard to the instant appeal, he has neither commenced any other proceeding or action before any court, tribunal or agency of the government, nor is there pending a similar action with other courts, tribunal or agency of the government, in relation to the issues being raised before this Honorable Court; and that to the best of his knowledge and belief, the instant case does not stem from, or is not related to, any case or proceeding, pending before any court, tribunal or agency of the government.

Statement of the Standard or Scope of Review

Federal courts are limited to review the administrative record on which the order of removal is based. INA § 242(b)(4)(A), 8 USC §1252(b)(4)(A). Administrative

findings of fact are conclusive *unless* any reasonable adjudicator would be "compelled to conclude the contrary". The Attorney General's discretionary judgment, on the other hand, is "conclusive *unless* manifestly contrary to law and an discretion". INA §242(b)(4)(D), 8 USC §1252(b)(4)(D).

A Summary of the Argument

Petitioner contends that he is not an arriving alien, contrary to the view posited by respondent Attorney General, since the record has revealed that, prior to the revocation of his asylee status, petitioner was lawfully admitted to the US at a port of entry; been inspected and authorized by an immigration officer; found eligible and granted asylum by the DHS itself, and re-entered the US on advance parole. Considering that he is not an arriving alien, petitioner may be eligible for adjustment of status, and the immigration court has acquired jurisdiction to hear arguments in favor of petitioner's aforesaid application for adjustment of status. The Immigration Court should not have pretermitted the Petitioner's adjustment application, but should have merely required him to file a waiver of the ground of inadmissibility that was created when he lied to the INS about a previous asylum application.

A r g u m e n t

Petitioner is not an arriving alien, considering that prior to the revocation of his asylee status, he legally entered the US at a port of entry; been inspected and authorized by an immigration officer; found eligible and granted asylum by the DHS itself, and re-entered the US on advance parole.

In the **first** Notice of Appear (NTA) dated July 22, 1998, it was alleged that petitioner was admitted to the U.S. but is deportable for a number of reasons. During the master calendar hearing (MCH), the DHS requested for marking of Exhibit 2, containing items 1 – 5, inclusive, consisting of, among others, a new NTA which superseded the former NTA, and hereafter alleged that petitioner is an arriving alien; that he is not a citizen or national of the U.S., but of India; that he applied for admission as an asylee and was paroled into the U.S. pursuant to Section 212(d)(5); that prior to that, on July 30, 1996, he attempted to seek entry by means of a fraudulent document; that he failed to inform the asylum officer that he used a different name and alien number when placed in a prior deportation proceedings; and that he was arrested in 1994 for a criminal offense. Petitioner, however, disputed these assertions, on the ground of lack of previous knowledge thereof, and failure to afford him the opportunity to rebut the same.

Contrary to the stand of respondent Attorney General, petitioner was lawfully admitted to the U.S., through advance parole, on March 4, 1997, pursuant to his asylee status. Moreover, petitioner possessed valid travel papers at the time of his admission to the country. Thus, he cannot be deemed an alien seeking to gain admission for the first time in the US. Even assuming *arguendo*, without however admitting that petitioner admitted the allegations in the amended NTA, the record has revealed that, prior to the revocation of his asylee status, petitioner was lawfully admitted to the US at a port of entry; been inspected and authorized by an immigration officer; found eligible and granted asylum by the DHS itself, and re-

entered the US on advance parole. Undoubtedly, these factors should have weighed in for the immigration court to conclude that petitioner is not an arriving alien, and therefore, may be eligible to apply for adjustment of status.

The Immigration Court has jurisdiction to adjudicate the adjustment application of petitioner considering that said application falls within the exception granted under 8 C.F.R. § 245. (c)(8).

Not only has petitioner been granted parole, and is considered a lawfully admitted alien, petitioner contends, furthermore, that his Form I-130 petition filed by his US citizen wife was approved, thus protecting his status under INA § 245 (i), and making him eligible to apply for adjustment thereof.

8 C.F.R. § 245.2(a)(1) states that –

> "(A)fter an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under Section 245 of the Act xx xx xx shall be made and considered only in those proceedings."

"All approved self-petitioners who applied for adjustment on or after January 14, 1998 or whose adjustment applications were pending on that date are eligible to adjust under INA §245(a) even if they entered without inspection or parole. They are also exempt from all bars to adjustment under INA § 245(c)."[p.539, 8th Ed., *Kurzban, "Immigration Law Sourcebook"*]. INA

§245(i) was extended up to April 30, 2001 for persons who were present in the U.S. on December 21, 2000. [*Legal Immigration Family Equity (LIFE)*].

Furthermore, in *"Matter of Grinberg,"* 20 I&N Dec.911 (BIA 1994), the BIA had occasion to hold, thus -

> "An immigration judge has jurisdiction to consider applications for adjustment of status under INA §245(i) filed by aliens previously ineligible under §245 (a) and §245 (c)."

There is no cavil of any doubt, therefore, that petitioner's case falls within the purview of the above-quoted statute and case. It is worthy to note that, the approved family-based petition was issued in petitioner's favor before the latter was placed in removal, and he availed of the benefit under 245(i) prior to its withdrawal or termination.

But even granting *arguendo,* without however admitting, that petitioner can be classified an "arriving alien who is in removal proceedings", as charged by the DHS, he is still exempted, however, from the prohibition stated in 8 C.F.R. §245.1(c)(8), since he had re-entered the US on advance parole. Said exemption is clearly laid under 8 C.F.R. § 245.2(a)(1), which provides, thus -

> "xxx xxx xxx An adjustment application by an alien **paroled under section 212(d)(5) of the INA,** which has been denied by the director, **may be renewed in removal proceedings** under 8

CFR part 240 only if:

"xx xx xx.

"(ii) The applicant's later absence from and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application." (Underline ours)

Said exemption is also found in INA § 1.1, 8 U.S.C. 1101, which defines an "arriving alien", thus -

"xx xx n arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act." (Underline supplied).

In the case at bar, petitioner's advance parole was granted to him, pursuant to his asylum protection previously obtained from the DHS, since he was able to satisfy the "credible fear standard". As a consequence, petitioner was paroled to the US to pursue his adjustment of status application. Contrary to the IJ's decision, the latter is not barred from proceeding with the case and

decide upon the application for adjustment of status filed by petitioner, since the exemption under the aforesaid provisions of law is applicable in the instant case. The DHS's contention of lack of jurisdiction, therefore, is devoid of any merit. "An alien placed in removal proceedings for other grounds of inadmissibility or deportability may remain eligible to adjust their status. In these cases, a corresponding waiver under INA §§212(h) and (i) may be necessary to accomplish the adjustment before the immigration court. If the immigration judge grants the waiver, the application to adjust status will be granted in the exercise of discretion concurrently." [p.281, Vol 1, 2001-02 Immigration & Naturalization Law Handbook, AILA].

The Immigration Court should not have pretermitted the Petitioner's adjustment application, but should have merely required him to file a waiver of the ground of inadmissibility that was created when he lied to the INS about a previous asylum application.

Finally, petitioner's previous criminal record showing that he had been charged with Simple Assault and Recklessly Endangering Another Person has been expunged, by virtue of the Order dated 14 May 2004, issued by the Court of Common Pleas of Philadelphia Country, Criminal Division.

CONCLUSION

WHEREFORE, it is respectfully prayed, that this Honorable Court reverse or set aside the District Court's decision denying petitioner's *habeas corpus* petition, and remanding the above-captioned case to the BIA, or the

immigration court, for reception of evidence in support of petitioner's application for adjustment of status.

Philadelphia, June 1, 2004.

EPHRAIM TAHIR MELLA, ESQ.
Counsel for the Petitioner
1822 Spring Garden Street
Philadelphia, PA 19130
Tel No. (215)564-9744

CERTIFICATE OF SERVICE

RAJINDER SINGH	)	**Case No.04-1501**
Petitioner,	)	
v.	)	**A# 75-018-954**
	)	
John ASHCROFT, in his	)	
Capacity as Attorney	)	
General of the U.S.,	)	
Respondent	)	

I HEREBY CERTIFY that on this 01st day of June, 2004, I caused to be served the:

PETITIONER'S APPEAL BRIEF

_____ by certified mail-return receipt requested to the person at the address set forth below

_____ by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid and causing the same to be mailed by first class mail to the person at the address set.

K.T. TOMLINSON NEWTON
Asst. United States Attorney
615 Chestnut Street
Suite 1250, Philadelphia, PA 19106-4476

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 01, 2004.

_____

Ephraim Tahir Mella, Esquire,

APPENDIX "N" - Petition for Panel Rehearing
Dated September 10, 2004

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STATEMENT OF COUNSEL FOR REHEARING EN BANC

I hereby express a belief, based on a reasoned and professional judgment, that the panel decision is conflicting with existing statute, particularly, INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks

entry at other than an open, designated port of entry ... is subject to the provisions of INA § 212(a)].

Further, this appeal involves a question of exceptional importance, *i.e.*, whether or not, despite the abrogation of the traditional distinction between exclusion and deportation hearings *per se,* and replacement of the same with removal hearings, full regard of constitutional rights should be given to someone if they are in the US even if they were not admitted. *Hoyte-Mesa v. Ashcroft*, 272 F. 3d 989 (7th Cir. 2001). Otherwise stated, whether or not the "entry doctrine fiction" should be the basis for determining when and under what circumstances persons are accorded due process in proceedings.

In the event of a positive determination, appellant must be said to have then "entered" the US, albeit he was not lawfully admitted, but nevertheless is still entitled to the trappings of due process, and hearing of his application for adjustment of his status.

TIMELINESS OF THE PETITION

This Court's opinion was filed, AND judgment was entered on August 27, 2004. Appellant files the instant petition for rehearing *en banc* on September 10, 2004.

1st A ignment of Error

Although the BIA sustained the IJ's decision that appellant had conceded to the charge that he is an "arriving" alien, the truth is that appellant was in fact deportable at the time he sought and was granted asylum, for having entered the US

without inspection, and allegedly having failed to disclose material facts to his asylum officer.

The Immigration Judge initially made a finding, in its Oral Decision, dated March 6, 2000, that appellant "had been admitted to the United States but was deportable for a number of reasons." However, he then concluded that appellant was an "arriving" alien, only after the INS amended the original charge sheet, and appellant's admission of the factual allegations contained therein. *(IJ's Oral Decision dated March 6, 2000).*

Notwithstanding his admission, however, appellant is deemed for all intents and purposes, an "inadmissible" (deportable) alien, rather than an "arriving" alien, since he was not lawfully admitted, but entered the US without inspection. INA § 212(a)(6)(A)(i). 8 C.F.R. § 235.1(d)(2) [An alien "present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry ... is subject to the provisions of INA § 212(a)].

In the instant case, there is no cavil beyond doubt that appellant's immigration status in the US squarely falls within the statutory definition of a DEPORTABLE (inadmissible) alien.

To evince this material factual allegation, the untraversed facts of the instant case reveal that appellant INITIALLY entered the US without inspection in 1992, and sought for asylum. After his asylum was denied, he was charged as a deportable alien in the Order to Show Cause (OSC) filed by the INS. In 1996, however, appellant re-entered the US, and re-applied for asylum. This time his application was granted,

albeit he was also charged for entry without inspection. On the basis of his asylum grant, appellant sought advance parole and was granted, and left the US. In March, 1997, he returned on the same parole issued to him. Subsequently, the INS terminated his asylum status, and placed him in removal under the amended charge of fraud or misrepresentation, although he was initially charged only with staying beyond the period authorized. While his removal proceedings were pending, appellant married his wife, a US citizen, who petitioned for him to become an immigrant, and whose petition was approved by the INS.

Considering the facts stated above, the Immigration Judge notwithstandingly concluded, albeit erroneously, that appellant was an "arriving" alien, since he based his conclusion solely on the admissions made by appellant, which the BIA later upheld. Moreover, it must be recalled that the initial charge leveled against appellant in the OSC, was for violation of his authorized stay in the US, after his asylum status had been revoked. It was later during the master calendar hearings, however, that the INS withdrew said initial charge, and amended it with other charges, including the fact that appellant allegedly is an "arriving" alien.

As a matter of fact, the hearings were re-set for a number of times because appellant's wife, who is a lawful permanent resident, petitioned for appellant to obtain an immigrant visa, which was granted in May, 2000. Despite conceding to the amended charges, there is no cavil beyond doubt that appellant is statutorily categorized as an inadmissible or deportable alien, since he actually entered the US without inspection.

Moreover, appellant argues that since his asylum grant has been revoked, his status has reverted to that of a person who enters EWI (Entry W/O Inspection), because a person who enters EWI is now considered in law to be an applicant for admission under INA § 235(a)(1), 8 U.S.C. § 1225(a)(1), who is inadmissible under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), and qualifies for parole into the US under 8 U.S.C. 1182(d)(5)(A), even if s/he does not meet the definition of an "arriving alien" under 8 C.F.R. § 1.1(q). Memo, Virtue, G.C. to Field (HQCOU 120/17-P)(Aug. 21, 1998), reprinted in 76, No. 26 Interpreter Release 1067-70 (July 12, 1999).

"The entry doctrine fiction has always been the basis for determining when and under what circumstances persons are accorded due process in proceedings. Although the IIRIRA has ended the traditional distinction between exclusion and deportation hearings *per se,* and replaced them with removal hearings, the entry doctrine may have continuing vitality in regard to whether full constitutional rights are given to someone if they are in the US even if they were not admitted. *Hoyte-Mesa v. Ashcroft*, 272 F. 3d 989 (7th Cir. 2001)."

Under the above-cited ruling of the Court of Appeals, appellant ratiocinates that although he was not lawfully admitted to the US, because his status as an asylee had been revoked, he nevertheless could be deemed to have made an "entry" to the US, since he was "free from restraint" by the INS, and was "at liberty for some period of time" in the US. *Nyirenda v. INS*, 279 F.3d 620 (8th Cir. 2002) [holding that "such restraint does not arise where a person makes a landing and is at liberty for some period of time]. The fact that he got married to a US citizen, and have his marriage-based petition for immigrant visa be approved by the INS, is clear proof that he has made an "entry" into the US.

"The question of admission also arises in the context of an adjustment application. An adjustment of status is not deemed an entry (even though the ground of inadmissibility are applicable), *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992); *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984). Nevertheless, the BIA has held that adjustment is an admission. *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999)."

2nd Assignment of Error

Contrary to the Panel's Decision, the Immigration Court has jurisdiction to adjudicate appellant's application for adjustment of status, due to the fact that he is eligible under 8 C.F.R. § 245.

Since appellant's immigration status has reverted to that of an EWI, rather than an "arriving" alien, he is covered by INA § 245(i)(1)(A)(i), 8 C.F.R. § 245.1, which provides that "an alien physically present in the United States, may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence." It is also noteworthy that appellant has an approved immigrant visa petition filed on his behalf on or before April 30, 2001, which made certain his eligibility to pursue said adjustment of status application under the statute. "All approved self-petitioners who applied for adjustment on or after January 14, 1998 or whose adjustment applications were pending on that date are eligible to adjust under INA §245(a) even if they entered without inspection or parole. They are also exempt from all bars to adjustment under INA § 245(c)."[p.539, 8th Ed., *Kurzban, "Immigration Law Sourcebook"*]. INA §245(i) was extended

up to April 30, 2001 for persons who were present in the U.S. on December 21, 2000. [*Legal Immigration Family Equity (LIFE)*].

Hence, appellant is not barred from seeking the relief of adjustment of status before the Immigration Judge, even when he was subsequently placed in removal proceedings.

> 8 C.F.R. § 245.2(a)(1) states that –
> "(A)fter an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under Section 245 of the Act xx xx xx shall be made and considered only in those proceedings."

Furthermore, in *"Matter of Grinberg,"* 20 I&N Dec.911 (BIA 1994), the BIA had occasion to hold, thus -

> "An immigration judge has jurisdiction to consider applications for adjustment of status under INA §245(i) filed by aliens previously ineligible under §245 (a) and §245 (c)."

WHEREFORE, it is respectfully prayed that this Hon. Court grant the petition for rehearing/rehearing *en banc*, vacating the Order previously issued by the Panel, and remanding the case to the BIA for adjudication of appellant's application for adjustment of status.

Appellant prays for such further relief as may be just and equitable under the circumstances.

EPRHAIM TAHIR MELLA, ESQUIRE
Counsel for Appellant

CERTIFICATE OF SERVICE

EPHRAIM TAHIR MELLA, ESQUIRE, hereby certifies that on the 14th day of September, 2004, he caused a copy of the Petition for Rehearing/Rehearing En Banc to be served on the following counsel, representing the Office of the Attorney General of the United States, by mail, postage prepaid :

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Executed this 10th day of September 2004 at Philadelphia, Pennsylvania.

_____

EPHRAIM TAHIR MELLA, ESQ.

Finally, you are directed to notify this Service of any change of address within ten days of such change. You may obtain Form AR-11 at your nearest post office or INS office to comply with this requirement.

Sincerely,

Larry F. Crider,
Acting Asylum Office Director

Hardeep Singh Rai

(2)

Supreme Court, U.S.
FILED
APR 4 - 2005
OFFICE OF THE CLERK

No. 04-1038

In the Supreme Court of the United States

RAJINDER SINGH, AKA SATINGER SINGH, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals correctly ruled that petitioner was ineligible to apply for adjustment of status in his removal proceedings because he had conceded that he was an arriving alien.

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In the Supreme Court of the United States

No. 04-1038

RAJINDER SINGH, AKA SATINGER SINGH, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.[1] The order of the district court (Pet. App. L) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. J) and the immigration judge (Pet. App. I) are unreported.

JURISDICTION

The judgment (Pet. App. A at 7-8) of the court of appeals was entered on August 27, 2004. A petition for rehearing was denied on December 2, 2004 (Pet. App. B at 1-2). The petition for a writ of certiorari was filed on January 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition does not contain pages numbers. For citation purposes, each portion of the appendix will be cited as if separately numbered.

STATEMENT

1. Under regulations promulgated pursuant to the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, an "arriving alien" is defined as "an applicant for admission coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. 1.1(q). "An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act." *Ibid.* Any "arriving alien who is in removal proceedings" is ineligible to apply for adjustment of status to that of a lawful permanent resident. 8 C.F.R. 245.1(c)(8); see 8 C.F.R. 245.1(a). Accordingly, the regulations provide that an immigration judge (IJ) lacks jurisdiction to consider an application for adjustment of status by an arriving alien who is in removal proceedings. 8 C.F.R. 245.2(a)(1) (emphasis added) ("After an alien, *other than an arriving alien*, is in deportation or removal proceedings, his or her application for adjustment of status * * * shall be made and considered only in those proceedings.").

2. Petitioner is a native and citizen of India. On March 26, 1992, he entered the United States without inspection. He applied for asylum on December 17, 1992, and that application was denied on September 27, 1994. On September 28, 1994, the Immigration and Naturalization Service (INS) issued an order to show cause, charging petitioner with deportability on the ground that he had entered the United States without inspection. Pet. App. A at 2; Pet. 6-7.[2]

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[2] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice, and its enforcement functions were transferred to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat.

On January 8, 1996, petitioner was apprehended when attempting to enter the United States from Canada without inspection. The same day, the INS again issued an order to show cause charging petitioner with deportability. On June 22, 1996, petitioner applied for asylum, and on July 30, 1996, his application for asylum was granted. Petitioner later left the country to travel abroad. When petitioner returned to the United States on March 4, 1997, the INS paroled petitioner into the country. See 8 U.S.C. 1182(d)(5)(A). On March 3, 1998, the INS informed petitioner of its intent to terminate his asylum on the ground that petitioner had committed fraud in connection with his application. On April 20, 1998, petitioner's asylum was terminated after he failed to appear for his asylum hearing. Pet. 7-8; Pet. App. A at 2-3; Pet. App. C at 1; Pet. App. E; Pet. App. H.

On July 22, 1998, the INS issued a notice to appear, charging petitioner with being removable on the ground that he had remained in the United States beyond his parole period. On December 8, 1998, the INS withdrew the initial charges and substituted allegations that petitioner was removable because he had committed fraud in seeking admission and had sought admission without proper documentation. The new charges specifically alleged, *inter alia*, that petitioner is "an arriving alien" and that he had "applied for admission to the United States as an asylee and [had been] paroled into the United States pursuant to section 212(d)(5) of the [INA]." Pet. App. A at 2-3; Pet. App. C; Pet. App. D.

2135. Because the relevant events in this case began before the reorganization, this brief continues to refer to the INS.

3. The proceedings before the IJ were continued on several occasions because petitioner's wife, a lawful permanent resident, had petitioned for naturalization and had submitted an application for adjustment of status on petitioner's behalf. At a hearing on March 6, 2004, petitioner, through counsel, "pleaded to the charging document * * * and admitted the factual allegations and conceded the charge of removability." Pet. App. I at 3. The IJ then ordered that petitioner be removed. The IJ reasoned that, because petitioner had admitted the charges, including the allegation that he is an arriving alien, the immigration court lacked jurisdiction to consider an application for adjustment of petitioner's status. *Ibid.*; see 8 C.F.R. 245.2(a)(1); 8 C.F.R. 245.1(c)(8).

On April 16, 2003, the Board of Immigration Appeals (BIA) affirmed the decision of the IJ. Pet. App. J. The BIA observed that petitioner had "admitted the allegations and conceded the removability charges, * * * including that [petitioner] is an 'arriving alien' and is removable." *Id.* at 2. The BIA held that, because petitioner "is an 'arriving alien' in removal proceedings," the IJ had "correctly determined that he lacked jurisdiction to adjudicate [petitioner's] application for adjustment of status." *Ibid.* (citing, *inter alia*, 8 C.F.R. 245.1(c)(8)).

4. a. Petitioner did not file a petition for review in the court of appeals. Instead, on May 2, 2003, petitioner filed a petition for a writ of habeas corpus in the district court. Pet. App. K.[3] The government's response argued

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[3] The court of appeals determined (see Pet. App. A at 4) that petitioner's case is governed by the "transition rules" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. See

that petitioner, as an arriving alien in removal proceedings, was not eligible to apply for adjustment of status. Gov't Resp. to Pet. for Writ of Habeas Corpus 7 (filed Jan. 16, 2004). On January 22, 2004, the district court dismissed the petition "for the reasons stated in the Government's opposition." Pet. App. L at 1.

b. The court of appeals granted the government's motion for summary affirmance, holding that the BIA had not abused its discretion in dismissing petitioner's administrative appeal. Pet. App. A at 1-8. The court explained that, under 8 C.F.R. 245.2(a)(1), an IJ lacks jurisdiction over the application for adjustment of status of an arriving alien who is in removal proceedings. Pet. App. A, at 5. In this case, the court observed, petitioner "had conceded that he was an

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IIRIRA § 309(c)(1) and (4), 110 Stat. 3009-625, 3009-626. That appears to be incorrect, because the notice to appear in this case was filed on July 22, 1998, and revised on December 2, 1998, after the April 1, 1997, effective date of IIRIRA. Pet. App. C, D. Judicial review in petitioner's case therefore is governed by 8 U.S.C. 1252, which provides that review of a final order of removal is only by way of petition for review in the court of appeals. See 8 U.S.C. 1252(a) and (b)(9). Under the transition rules, judicial review is governed by former 8 U.S.C. 1105a (1994), except that, *inter alia*, judicial review of an order of exclusion is in the court of appeals rather than in the district court, as had been provided in 8 U.S.C. 1105a(b) (1994). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626. Although IIRIRA's transition rules, like the permanent rules (8 U.S.C. 1252(a)(2)(C)), preclude judicial review in the courts of appeals in the cases of certain criminal aliens (see IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626), petitioner was not ordered removed on one of the grounds that triggers those preclusions. Compare *INS* v. *St. Cyr*, 533 U.S. 289, 298-314 (2001) (holding that habeas corpus review is available to consider pure questions of law in challenge to removal order where direct review in court of appeals is precluded).

'arriving alien,'" and an "'arriving alien' remains such even if paroled." *Ibid.* (citing 8 C.F.R. 1001.1(q)). The court further noted that, "to the extent [petitioner] denies having conceded to the charge of being an arriving alien, he has failed to provide any evidence to rebut the BIA and Immigration Judge's findings." *Id.* at 5-6.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 12-17) that he is not an arriving alien and that the IJ therefore had jurisdiction to consider his application for adjustment of status. That fact-bound contention lacks merit.

The INS's amended charge specifically alleged that petitioner is "an arriving alien" and that he had "applied for admission to the United States * * * and [was] paroled into the United States pursuant to section 212(d)(5) of the [INA]." Pet. App. D at 2. Both the BIA and the IJ observed that petitioner had admitted those allegations, Pet. App. I at 3; Pet. App. J at 2, and petitioner does not dispute the point, see Pet. 8. The fact that petitioner was paroled into the United States pursuant to Section 212(d)(5) does not affect his status as an arriving alien. See 8 C.F.R. 1.1(q) ("An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act.").[4] As an arriving alien in removal

[4] An alien who is granted advance parole before departing the United States is not considered an arriving alien for purposes of expedited removal proceedings under Section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A). See 8 C.F.R. 1.1(q). That exception,

proceedings, petitioner was ineligible to apply for adjustment of status, 8 C.F.R. 245.1(c)(8), and the IJ lacked jurisdiction to consider an application for adjustment of status, 8 C.F.R. 245.2(a)(1).

Petitioner appears to contend (Pet. 13-14) that he is not properly considered an arriving alien because he has previously made (illegal) entries into the country. Petitioner acknowledged in his administrative proceedings, however, that he was "paroled into the United States pursuant to section 212(d)(5) of the [INA]." Pet. App. D at 2. Although petitioner previously has made illegal entries into the United States, his most recent effort to gain admission to the United States was on March 4, 1997. On that occasion, petitioner did not effect an illegal entry but, rather, was paroled into the country.

2. Petitioner argues (Pet. 18-19) that, even if he is an arriving alien, he falls within an exception permitting an IJ to consider an application for adjustment of status of an arriving alien who was "paroled under section 212(d)(5) of the Act," and who was previously denied an adjustment of status, if: (i) the denied application was "properly filed subsequent to the applicant's earlier inspection and admission"; and (ii) the alien's "later absence from and return to the United States was under the terms of an advance parole authorization" that was "granted to permit the applicant's absence and return to pursue the previously filed adjustment application." 8 C.F.R. 245.2(a)(1). The court of appeals correctly rejected petitioner's reliance on that exception. Pet. App. A at 6. The exception presumes an "earlier in-

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as the court of appeals correctly found, has no application here because petitioner was not placed in expedited removal proceedings. Pet. App. A at 5 n.5.

spection and admission," but petitioner has no previous "inspection and admission." His entries in 1992 and 1994 were without inspection, and although he was granted asylum after attempting to enter in 1996, the subsequent revocation of his asylum resulted in his reverting to the status of an inadmissible alien. See 8 U.S.C. 1158(c)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2005

(3)

Supreme Court, U.S.
FILED
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No. 04-1038

In the Supreme Court of the United States

RAJINDER SINGH,
a.k.a. Satinger Singh

Petitioner,

vs.

ALBERTO R. GONZALES,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I. In the light of the precedent-setting decision of the Court of Appeals for the First Circuit, in the case of *SUCCAR v. ASHCROFT,* 394 F.3d 8 (1st Cir. 2005), non-citizens in removal proceedings who meet the regulatory definition of an "arriving alien", including individuals who have been paroled into the United States, may apply for adjustment of status to that of a lawful permanent resident, on any basis and in any form, before either an Immigration Judge or the District Office of the Department of Homeland Security.

II. Since this recently-decided First Circuit case conflicts with the decision of the Third Circuit reached in the instant, on the issue of eligibility of an "arriving alien", who is in removal proceedings, to adjust status, there is a compelling reason, therefore, for this Honorable Court to grant the instant Petition for Writ of Certiorari.

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Succar v. Ashcroft, 394 F.3d 8 (1st Cir. 2005) 1

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. A) was entered on August 27, 2004, under the caption *Singh v. Ashcroft*, No. 04-1501 (3rd Cir. 2004)(unpublished). Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on December 2, 2004. (Pet App. B).

JURISDICTION

The Petition for Writ of Certiorari has been filed within the reglementary period prescribed by law, which is on January 13, 2004, reckoned from ninety (90) days from the date of the decision of the Third Circuit Court of Appeals on December 2, 2004, denying Petitioner's Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner hereby incorporates and repleads the Statement of the Case and Facts contained in his original Petition for a Writ of Certiorari as forming part and parcel of this Statement.

ARGUMENT

In the light of the recently decided case of *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), there is a compelling need to review the the record of the instant case, to determine whether or not to grant the petition for writ of certiorari, considering that the issues raised in this case are similar in nature to those raised in *Succar*, except for the fact that the Third Circuit had rendered a decision which is contradictory to that reached by the First Circuit.

Conceding for the time being that Petitioner in this case is an "arriving alien" (albeit, Petitioner had contended that the revocation of his asylee status does not change the fact that he had entered the US without

inspection and authorization, and therefore, he is deemed inadmissible, not an arriving, alien. *see Pet. 14*), Petitioner is nevertheless eligible to apply for adjustment of status, in accordance with the dicta laid down in *Succar*.

In that First Circuit case of *Succar*, petitioner Succar applied for asylum, and was paroled into the US. He was subsequently placed in removal proceedings, and admitted the factual allegations in the Notice to Appear and conceded removability. He renewed his application for asylum before the Immigration Judge. After conducting hearings on the merits, the Immigration Judge denied Succar's request for asylum and withholding of removal. He appealed the Immigration Judge's decision to the BIA.

While his appeal was pending, and while paroled into the US, Succar married a US citizen. His wife filed an immigrant petition for him, which was approved. Succar later filed a motion to remand with the BIA, seeking to remand his case to the Immigration Judge for consideration of his application for adjustment of status under 8 U.S.C. §§ 1255(a).

The remand proved to be fruitless for the INS took the position that under 8 C.F.R. §245.1(c)(8), Succar was ineligible to apply for adjustment of status either before the Immigration Judge in the removal proceedings or, separately, before the Immigration Service's district director.

At the hearing before the Immigration Judge, Succar submitted his application for adjustment of status. The Immigration Judge, however, opined that he had no "authority to adjust status to someone who is an arriving alien". Consequently, the Immigration Judge denied said application based on 8 C.F.R. §245.1(c)(8).

After elevating the matter to the BIA on appeal, the BIA affirmed the Immigration Judge's finding, and concurred with the latter that Succar was "ineligible for adjustment of status because he is an arriving alien".

Upon a petition for review with the First Circut, the court held that "there is no statutory bar to review and that the regulation, (8 C.F.R. § 245.1(c)(8), is contrary to the language and intent of the statute, 8 U.SC. §1255(a)." As a result, the First Circuit vacated the order removing Succar from the United States and remanded the case for further proceedings.

The First Circuit found its logic on the intention given by Congress when it passed the adjustment of status statute found in 8 U.SC. §1255(a). According to the First Circuit, "(T)he statutory scheme reflects Congress's careful balancing of the county's security needs against the national interests Congress wished to advance through adjustment of status proceedings. The regulation upsets the balance Congress created."

The First Circuit further stated that when the law or statute expressly defines the persons or group of persons belonging to a particular category - such as those who have parole status, or parolees in removal proceedings - to be eligible for relief, the Attorney General does not have the discretion to choose those who are eligible for relief and those who are not. Applying the maxim "*inclusio unios est exclusio alterius*" - what the law does not exclude, it includes - it held that the Attorney General may exercise discretion only when the law or statute is silent on eligibility.

Summarizing its findings, the First Circuit held that Congress has been "explicit about where the Attorney General has been granted discretion and where he has not. By contrast with other areas, there is no explicit grant of discretion to redefine eligibility to apply for adjustment of status of parolees to exclude those in removal proceedings." (*Underline and bold ours*).

"Checking our construction of he statute against the legislative history of section 1255, we find the regulation to be inconsistent with the intent expressed in the statute. In 1960, when Congress included paroled aliens as aliens who are eligible for adjustment of status relief through section 1255, it did so to solve certain problems xx xx. The effect of the regulation is to re-institute the problems Congress wished to solve. Further, until the 1997 promulgation of the regulation, the Attorney General had consistently interpreted section 1255 in a manner consistent with the statute and the legislative history and inconsistent with the 1997 regulation."

Like *Succar*, Petitioner Singh was a parolee who was placed in removal proceedings. He was granted parole prior to April 1, 1997, the effective date of 8 C.F.R. 245.1(c)(8). While in removal, Petitioner's wife, a lawful permanent resident and applicant for naturalization, filed an I-

130 spousal petition on his behalf, which was approved. Subsequently, he filed an adjustment of status application before the Immigration Judge, who denied the same for lack of jurisdiction based on 8 C.F.R. 245.1(c)(8). The BIA, on appeal, affirmed the Immigration Judge's denial.

Unlike the First Circuit, however, the Third Circuit dismissed Petitioner's Petition for Review, and likewise, his Petition for Panel Rehearing, on two (2) grounds, namely that: a) Petitioner was a an "arriving alien and parolee; and b) Petitioner's entry into the United States was without inspection and admission. It likewise upheld the validity of the regulation, 8 C.F.R. 245.1(c)(8). Hence, under the foregoing circumstances, there is no cavil beyond doubt that a further review of the facts and issues asseverated by Petitioner is warranted to achieve uniformity in the interpretation of federal laws by the circuit courts.

CONCLUSION

WHEREFORE, it is respectfully prayed that Petitioner's petition for certiorari be granted by this Hon. Court.

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No. 04-1038

In the Supreme Court of the United States

RAJINDER SINGH,
a.k.a. Satinger Singh

Petitioner,

vs.

ALBERTO R. GONZALES,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

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Counsel for Petitioner, Rajinder Singh

INTRODUCTION

In the light of the precedent-setting decision of the Court of Appeals for the First Circuit, in the case of *SUCCAR v. ASHCROFT*, 394 F.3d 8 (1st Cir. 2005), non-citizens in removal proceedings who meet the regulatory definition of an "arriving alien", including individuals who have been paroled into the United States, may apply for adjustment of status to that of a lawful permanent resident, on any basis and in any form, before either an Immigration Judge or the District Office of the Department of Homeland Security.

Since this recently-decided First Circuit case conflicts with the decision of the Third Circuit reached in the instant, on the issue of eligibility of an "arriving alien", who is in removal proceedings, to adjust status, there is a compelling reason, therefore, for this Honorable Court to grant the instant Petition for Writ of Certiorari.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. A) was entered on August 27, 2004, under the caption *Singh v. Ashcroft*, No. 04-1501 (3rd Cir. 2004)(unpublished). Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on December 2, 2004. (Pet App. B).

JURISDICTION

The Petition for Writ of Certiorari has been filed within the reglementary period prescribed by law, which is on January 13, 2004, reckoned from ninety (90) days from the date of the decision of the Third Circuit Court of Appeals on December 2, 2004, denying Petitioner's Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner hereby incorporates and repleads the Statement of the Case and Facts contained in his original Petition for a Writ of Certiorari as forming part and parcel of this Statement.

ARGUMENT

In the light of the recently decided case of *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), there is a compelling need to review the record of the instant case, to determine

whether or not to grant the petition for writ of certiorari, considering that the issues raised in this case are similar in nature to those raised in *Succar*, except for the fact that the Third Circuit had rendered a decision which is contradictory to that reached by the First Circuit.

Conceding for the time being that Petitioner in this case is an "arriving alien" (albeit, Petitioner had contended that the revocation of his asylee status does not change the fact that he had entered the US without inspection and authorization, and therefore, he is deemed inadmissible, not an arriving, alien. *see Pet. 14*), Petitioner is nevertheless eligible to apply for adjustment of status, in accordance with the dicta laid down in *Succar*.

In that First Circuit case of *Succar*, petitioner Succar applied for asylum, and was paroled into the US. He was subsequently placed in removal proceedings, and admitted the factual allegations in the Notice to Appear and conceded removability. He renewed his application for asylum before the Immigration Judge. After conducting hearings on the merits, the Immigration Judge denied Succar's request for asylum and withholding of removal. He appealed the Immigration Judge's decision to the BIA.

While his appeal was pending, and while paroled into the US, Succar married a US citizen. His wife filed an immigrant petition for him, which was approved. Succar later filed a motion to remand with the BIA, seeking to remand his case to the Immigration Judge for consideration of his application for adjustment of status under 8 U.S.C. §§ 1255(a).

The remand proved to be fruitless for the INS took the position that under 8 C.F.R. §245.1(c)(8), Succar was ineligible to apply for adjustment of status either before the Immigration Judge in the removal proceedings or, separately, before the Immigration Service's district director.

At the hearing before the Immigration Judge, Succar submitted his application for adjustment of status. The Immigration Judge, however, opined that he had no "authority to adjust status to someone who is an arriving alien". Consequently, the Immigration Judge denied said application based on 8 C.F.R. §245.1(c)(8).

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The First Circuit found its logic on the intention given by Congress when it passed the adjustment of status statute found in 8 U.SC. §1255(a). According to the First Circuit, "(T)he statutory scheme reflects Congress's careful balancing of the county's security needs against the national interests Congress wished to advance through adjustment of

status proceedings. The regulation upsets the balance Congress created."

The First Circuit further stated that when the law or statute expressly defines the persons or group of persons belonging to a particular category - such as those who have parole status, or parolees in removal proceedings - to be eligible for relief, the Attorney General does not have the discretion to choose those who are eligible for relief and those who are not. Applying the maxim "*inclusio unios est exclusio alterius*" - what the law does not exclude, it includes - it held that the Attorney General may exercise discretion only when the law or statute is silent on eligibility.

Summarizing its findings, the First Circuit held that Congress has been "explicit about where the Attorney General has been granted discretion and where he has not. By contrast with other areas, there is no explicit grant of discretion to redefine eligibility to apply for adjustment of status of parolees to exclude those in removal proceedings." (*Underline and bold ours*).

"Checking our construction of the statute against the legislative history of section 1255, we find the regulation to be inconsistent with the intent expressed in the statute. In 1960, when Congress included paroled aliens as aliens who are eligible for adjustment of status relief through section 1255, it did so to solve certain problems xx xx. The effect of the regulation is to re-institute the problems Congress wished to solve. Further, until the 1997 promulgation of the regulation, the Attorney General had consistently interpreted section 1255 in a manner consistent with the

statute and the legislative history and inconsistent with the 1997 regulation."

Like *Succar*, Petitioner Singh was a parolee who was placed in removal proceedings. He was granted parole prior to April 1, 1997, the effective date of 8 C.F.R. 245.1(c)(8). While in removal, Petitioner's wife, a lawful permanent resident and applicant for naturalization, filed an I-130 spousal petition on his behalf, which was approved. Subsequently, he filed an adjustment of status application before the Immigration Judge, who denied the same for lack of jurisdiction based on 8 C.F.R. 245.1(c)(8). The BIA, on appeal, affirmed the Immigration Judge's denial.

Unlike the First Circuit, however, the Third Circuit dismissed Petitioner's Petition for Review, and likewise, his Petition for Panel Rehearing, on two (2) grounds, namely that: a) Petitioner was a an "arriving alien and parolee; and b) Petitioner's entry into the United States was without inspection and admission. It likewise upheld the validity of the regulation, 8 C.F.R. 245.1(c)(8). Hence, under the foregoing circumstances, there is no cavil beyond doubt that a further review of the facts and issues asseverated by Petitioner is warranted to achieve uniformity in the interpretation of federal laws by the circuit courts.

CONCLUSION

WHEREFORE, it is respectfully prayed that Petitioner's petition for certiorari be granted by this Hon. Court.

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CERTIFICATION

This is to certify that this Petition for Rehearing is resstricted to the grounds set forth in the above arguments of counsel, and that it has been filed in good faith, and not for the purpose of any delay.

EPHRAIM TAHIR MELLA, ESQ.